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ABSTRACT  
OPINION  
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BOARD OF EDUCATION, NORTHFIELD )  
TOWNSHIP HIGH SCHOOL, DISTRICT )  
NO. 225, COOK COUNTY, ILLINOIS, )  
for use of Samuel S. Palumbo, )  
d/b/a Palumbo Excavating Co., )  
and SAMUEL S. PALUMBO, d/b/a )  
Palumbo Excavating Co., )

Appellees, )

v. )

PACIFIC NATIONAL FIRE INSURANCE )  
COMPANY, et al., )

ON APPEAL OF PACIFIC NATIONAL FIRE )  
INSURANCE COMPANY, a California )  
corporation, and UNITED PACIFIC )  
INSURANCE COMPANY, a Washington )  
corporation, )

Appellants. )

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

28 I.A. 2d

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant insurance companies appeal from a use judgment entered on a general contractor's statutory payment bond, in favor of a subcontractor and against defendants as sureties.

As authorized by statute, plaintiff, Samuel S. Palumbo, an unpaid subcontractor, brought suit on the bond against the defendant sureties to recover for excavating services rendered by him in the construction of a public high school. (Ill. Rev. Stat. 1951, Ch. 29, ¶¶15, 16.) Defendants answered, denying liability, asserting that the action was barred by the provisions of paragraph 16, because the verified notice of plaintiff's claim was not filed with the Board of Education within 180 days after he last furnished labor or materials to the job. The trial court, upon written interrogatories, decided this question against plaintiff and entered

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a summary judgment for the defendants.

On appeal by plaintiff, this court reversed the judgment and remanded the cause for further proceedings in accordance with the views expressed in the opinion. (Board of Education v. Pacific National Fire Ins. Co., 19 Ill. App. 2d 290 (1958).) In that opinion, the essential facts and issues constituting the background of the litigation are fully stated and need not here be repeated in detail. We there decided that the Palumbo verified notice of claim, served on the Board of Education more than 180 days after his last work, was sufficient to bring him within the provisions of paragraph 15 in his suit on the bond to recover his unpaid balance, after final settlement had been made between the public body and the principal contractor. On remandment, and after some further pleading, the trial court, on motion, entered judgment for plaintiff, and defendants appeal.

In this second appeal, defendants do not contend that the judgment is not in conformity with the first appeal decision and the views expressed therein, but they reargue the material question there decided, urge that the decision is erroneous, and ask that we reverse the instant judgment and reinstate the summary judgment in favor of defendants. <sup>Defendants'</sup> Plaintiff's argument that if the prior decision is palpably erroneous, it is proper for this court to correct it on the second appeal, has no merit in this case. Awotin v. Atlas Exchange National Bank, 275 Ill. App. 530, 547 (1934); Thomason v. Chicago Motor Coach Co., 298 Ill. App. 626 (1939).

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We believe the only question properly presented on this second appeal is whether the judgment of the trial court is in accordance with the mandate and directions of this court, as all the questions of law in this case were adjudicated on the former appeal. (People v. National Builders Bank, 12 Ill. 2d 473, 476, 477 (1957); People v. Militzer, 301 Ill. 284, 287 (1922).) We have examined the record of the proceedings in the trial court and find that the instant judgment entered for plaintiff is in harmony with the decision of this court and its interpretation of paragraphs 15 and 16 of Chapter 29, as applied to the facts of this case.

We have considered plaintiff's contention that the trial court improperly denied his request for attorney's fees claimed under section 155 of the Illinois Insurance Code (Ill. Rev. Stat. 1953, Ch. 73, ¶767). If section 155 applies here, on which we make no decision, the allowance of such fees is discretionary, and the record does not show an abuse of that discretion.

As every material question presented in the instant appeal was decided by us in the former appeal, the adjudication then made must stand as the law of this case, and the judgment herein appealed from is affirmed.

AFFIRMED.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.



28 #2

IN THE  
APPELLATE COURT OF ILLINOIS  
- - - -  
FOURTH DISTRICT  
- - - -

October Term, A. D. 1960

28 I.A. 2d 30

RALPH CARLYLE,	)	At Law 58-4
Plaintiff-Appellant,	)	
	)	Appeal from the
vs.	)	
	)	Circuit Court of
KATHRYN CARLYLE,	)	
Defendant-Appellee.	)	Hamilton County, Illinois.

Honorable Roy O. Gulley, Judge Presiding

HOFFMAN, JUSTICE

This is an action for malicious prosecution brought by appellant against his former wife. At the close of plaintiff's evidence, the defendant moved for a directed verdict. The court reserved its ruling and ordered the defendant to proceed with her proofs. After the defendant had introduced some evidence, she renewed her motion for a directed verdict and it was allowed.

The question upon appeal is the propriety of the court's ruling upon this motion. The ruling, though made part way through defendant's case, must be considered by us as though it came at the close of plaintiff's evidence. It presents the single question whether there is in the record any evidence which, standing alone and taken with all its intendments most favorable to the plaintiff, tended to prove the material elements of his case. If there was a



total failure to prove one or more of the necessary elements of the action, the motion for a directed verdict was properly allowed. Weiss v. City of Chicago, 23 Ill. App. 2d 280, 162 N.E. 2d 601.

The parties to this lawsuit were married in 1946 and divorced in 1957. Their married life was a stormy one, punctuated by quarrels and fights. The divorce decree divided the property and imposed certain obligations upon each party, some of which had not been performed by late 1957. In December of this latter year, the defendant sought to recover certain furniture and household effects which the plaintiff had retained in his possession since the divorce. Defendant sent a trucker for these articles, but plaintiff would not agree to their being taken. Defendant then went to the state's attorney, informed him that she could not get the articles, and, under the direction of the state's attorney, filed a complaint in a justice court seeking a peace bond against her former husband. A warrant for plaintiff's arrest was issued by the justice, but plaintiff was never arrested, all parties informally agreeing to a date for a hearing. At the hearing the prosecutions was conducted by the state's attorney, the justice found for the plaintiff, dismissed the complaint and charged all costs to the defendant here. In the following March, plaintiff filed this action for malicious prosecution.

"An action for malicious prosecution is an action for damages by one against whom a criminal prosecution or civil suit has been instituted maliciously and without probable cause.... and it is not favored in the law." Shedd v. Patterson, 302 Ill. 355, 359.





To authorize the maintenance of such an action, the following essential elements must be shown: (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceedings; and, (6) the suffering of injury or damage as a result of the action or prosecution complained of. *Shelton v. Barry*, 328 Ill. App. 497, 507, 66 N. E. 2d 697, 702. Each of these elements must exist and be proven in order to sustain the action. *Schwartz v. Schwartz*, 366 Ill. 247, 8 N. E. 2d 668.

It should be noted that there must be both malice and want of probable cause and they must concur, (*Glenn v. Lawrence*, 280 Ill. 581); and that want of probable cause cannot be inferred from malice. *McElroy v. Catholic Press Co.*, 254 Ill. 290. Moreover, malice is not merely spite or hatred against an individual but is malus animus, and denotes that the party is actuated by improper and indirect motives. *Farris v. Messimore*, 219 Ill. App. 582.

An examination of the evidence offered by plaintiff, when viewed in the light most favorable to him, clearly illustrates that this is a case arising out of the hatreds generated by a divorce. Both parties were dealing with each other spitefully and with consummate hatred. Neither was bending any effort towards making the decree of divorce operable. Nothing more is shown by the evidence. Nowhere is there clear proof of malus animus, nor clear want, technically, of probable cause. Moreover, plaintiff has shown no greater suffering or injury than he has put to defendant, and



plaintiff's suit was undoubtedly actuated with spite equal to that of the defendant's.

This is clearly a suit that should never have been filed, and it was quite properly dismissed. The order of the trial court directing a verdict for defendant is affirmed.

Judgment affirmed.

Culbertson, P. J., and Scheineman, J., concur.

(Publish abstract only.)

**FILED**  
DEC 5 1960  
*James P. McLaughlin*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



NO. 11,302

Agenda 4

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, FIRST DIVISION  
OCTOBER TERM, A. D. 1959

RAMONA EIDENMILLER,

Plaintiff-Appellee,

vs.

BOARD OF EDUCATION OF COMMUNITY  
HIGH SCHOOL DISTRICT NO. 505,  
BUREAU COUNTY, ILLINOIS,

Defendant-Appellant.

Appeal from the  
Circuit Court of  
Bureau County.

28 I.A. 80<sup>2</sup>

McNEAL, P. J.:

This case involves the dismissal of Ramona Eidenmiller from her position as a teacher by the Board of Education of Community High School District No. 505 of Bureau County, Illinois.

Ramona Eidenmiller is married and the mother of one child. She attended Marycrest, the University of Illinois, Iowa State Teachers College, and received a master's degree. She first began teaching in 1943, and for several years prior to her dismissal she had been teaching home economics at defendant's high school. There were no complaints concerning her teaching ability prior to this case.

In the spring of 1956 the principal of the high school asked Mrs. Eidenmiller to coach a school play "The Adventures of Tom Sawyer", and stated that she would receive extra compensation. There is a dispute in the evidence as to whether her extra compensation was to amount to the sum of \$100 or the sum of \$150. She had several discussions regarding her compensation with some of the members of the board of education and with the superintendent of schools. They suggested that she discuss the matter with the board of education at a meeting to be held on August 6, 1956.

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Mrs. Eidenmiller appeared before the board on that date and read at length from a prepared statement, a copy of which was introduced into evidence. In this statement she claimed that she had been offered \$150 to coach the play, and among many other things she criticized the handling of school activity funds, pointing out that when such funds were turned in, the money was not counted and receipts given.

At the outset the board did not take offense at her statement and was not seriously concerned with her criticism. The board made no investigation of the matters discussed at the meeting. Further, there is a letter in the record from Mrs. Eidenmiller to the secretary of the board wherein she stated that the only reason for her appearance was the dispute over her extra compensation, and rather than create problems or more complications she was willing to accept the \$100 which had been offered to her.

Unfortunately, for some reason which does not appear in the record, the matter was not dropped at this point. Instead there is evidence that the board requested Mrs. Eidenmiller to resign because of poor health, and other evidence that the board demanded that she appear again and have her remarks taken down on a tape recorder.

When Mrs. Eidenmiller refused to resign, proceedings were instituted against her under the Teacher Tenure Law, the charge being that the best interests of the school required her resignation. She was also charged with various acts of insubordination, the most important being that she had accused the principal of "embezzling money from the activity fund for his private gain, saying that 'the activity fund is very lucrative to the Principal.'"

Many hearings were held on these charges extending over a period of more than a year. The hearings were interspersed with various mandamus and Tunction proceedings, all of which were incorporated in the 967-page which ord. There was considerable evidence with reference to the matter has extra compensation, the sum and substance of which was that the P. & is and principal honestly differed in their recollections should

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as to whether Mrs. Eidenmiller was to receive \$100 or \$150 for her work in coaching the play. Likewise considerable evidence was offered with respect to the handling of the activity fund. The substance of this evidence was that there were no shortages in any of the funds but, as was pointed out in the teacher's statement of August 6, the funds were not always counted and receipts given at the instant the funds were turned in. The witnesses agreed that such procedure would be the better practice but that it was not always followed in the smaller schools.

Following the many and extended hearings, during the course of which all of the board members took the witness stand against the teacher, the board entered an order occupying over thirty pages of the abstract. In the order the board found that the testimony of its members was credible and that the testimony of the teacher was not credible and accordingly sustained all of the charges against her. Mrs. Eidenmiller sought a review of the board's action by the circuit court under the Administrative Review Act, and the circuit court, after filing a well-considered opinion, reversed the decision of the board of education as manifestly contrary to the weight of the evidence. This appeal followed.

The present action against Mrs. Eidenmiller was brought under the Teacher Tenure Law (Section 24-1 et seq. of The School Code; Par. 24-1 et seq. Ch. 122, Ill. Rev. Stat. 1957). In *Hankenson v. Board of Education*, 10 Ill. 2d 560, 563, the Supreme Court said:

"The Teacher Tenure Law was enacted for the purpose of improving the educational facilities of this State by assuring teachers who have completed their probationary periods and have entered upon contractual continued service that their employment depends upon merit and not upon the personal whims of individual citizens."

The Teacher Tenure Law affords the teacher a right to a hearing at which the teacher may be present with counsel and at which the teacher has the right to offer evidence and cross-examine witnesses. This hearing is not a mere formality but is a substantial right and the hearing should be fair in all respects. 78 C.J.S. 1096, Schools and



School Districts, Sec. 204d.

The circuit court questioned whether the hearing in this case was a fair one, pointing out that counsel for the board consistently advised the board to overrule all objections made by counsel for the teacher, and further that all members of the board testified against the teacher and then found that their testimony was credible and hers was not. The trial court commented that the lengthy findings of the board appear to be more of a vehicle to argue the case on review rather than such an order as the statute contemplates, and our study of the record tends to confirm the observations of the circuit court.

The contention is made that the order of the board should be set aside because it was not entered within sixty days from the date the teacher was served with notice of the charges as the statute requires. This is an important provision which should be followed, but in view of the fact that some of the continuances were at the request of the teacher and others were occasioned by the various mandamus and injunction actions, we do not feel that the board's order should be set aside on this ground.

As to the merits of this controversy, we are aware of the rule that the findings of the school board should be regarded as being prima facie correct and that we have no right to re-weigh the evidence. We are also aware of the rule that where the findings of the administrative tribunal are manifestly contrary to the weight of the evidence, then it is not only our right but our duty to set those findings aside. *Harrison v. Civil Service Com.*, 1 Ill. 2d 137, 146; *Secaur v. Civil Service Com.*, 408 Ill. 197, 203; and *Brown Shoe Co. v. Gordon*, 405 Ill. 384, 392. We believe that the finding that the teacher accused the principal of "embezzling money from the activity fund" is manifestly contrary to the weight of the evidence. There is no reason to doubt that the written statement contained in the record in this case is the statement read by the teacher before the board, and there are clearly no such charges in that statement. The statement merely questions whether proper procedures were followed in handling the fund, and later evidence substantiated the

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questions raised by the teacher. As to the various charges of insubordination for failure to appear at certain meetings, these all occurred after the board had unanimously voted to ask the teacher to resign, and some of the meetings she did not attend were on advice of her counsel. Under these circumstances the finding that her conduct constituted insubordination is against the manifest weight of the evidence. As to the finding that the teacher should be dismissed because of the best interests of the school, the evidence is undisputed that there were no complaints about the teacher prior to August 6, 1956. There is no evidence as to any damage to the educational system of the school or its standards or discipline resulting from the teacher's conduct or ability, her cooperation or lack of the same with the school authorities, or any acts on her part. We have no doubt that the well-being of this school has suffered as a result of this unfortunate controversy, but at least some of the responsibility for the situation must be placed on the insistence of the school board that this teacher be dismissed.

Counsel for the board places considerable reliance on *Keyes v. Board of Education*, 20 Ill. App. 2d 504, and *Jepsen v. Board of Education*, 19 Ill. App. 2d 204. In the *Keyes* case the teacher mailed his criticisms of the board to the public, and in the *Jepsen* case the teacher voiced his criticisms at a teachers' institute. In the latter case the Court said (page 210) that such criticisms should be taken up with the proper officials, such as the superintendents and board of education. This was the procedure followed by the teacher involved in the instant case.

In view of the foregoing it is the conclusion of this Court that the judgment of the Circuit Court of Bureau County should be and is hereby affirmed.

Affirmed.

~~DOVE, J. CONCURS. SMITH, P. J. CONCURS. DOVE, J. DISSENTS.~~

SMITH, P. J. SPECIALLY CONCURS. DOVE, J. DISSENTS.



SMITH, P. J. , Specially Concurring:

Ramona Eldenmiller was discharged from her position as a tenure teacher by the defendant Board of Education in proceedings instituted under the Teacher Tenure Law (Chapt. 122, Par. 24-1 et seq. Ill. Rev. Stat 1957). On appeal to the Circuit Court under the Administrative Review Act (Chapt. 110 Sec. 654 et seq. Ill. Rev. Stat. 1957) the decision of the Board of Education was reversed as contrary to the manifest weight of the evidence. The record is before this court for further review on an appeal by the Board of Education.

This record is unique among the reported decisions in Illinois for the two-fold reason that, (a) the conduct upon which the dismissal of the teacher is justified took place at a Board meeting or in the presence of school administrative personnel and, (b) the witnesses for the Board





were the County Superintendent of Schools, the principal, the school treasurer and eight board members (one having removed from the district and, having been replaced, returned to testify). It will be observed that seven quasi-judicial officers doffed their judicial robes, assumed the role of witnesses and testified for the record. It should also be noted that the teacher acquired tenure status in March of 1956, that thirty of the thirty-five girls in school were in her Home Economics classes, that the State Supervisor in writing had commended the department for its two year improvement under the teacher and that, prior to August 6, 1956, it is admitted that there were no complaints against her. It is somewhat difficult to focus the picture in this 985 page record, redundant with trivia, or in the Board's Findings of Fact, which occupy thirty pages of the abstract.

The teacher had coached a play in the Spring of 1956, for which she was to have been paid additional compensation. Not having been paid by July she called the secretary of the Board, was advised that he would take it up at the meeting that night, and, next day, another member of the Board came by her home and advised her that there was a dispute about the amount, she claiming \$150.00 and the principal stating it was to be \$100.00. She said this was just another misrepresentation of the principal, discussed salary discrimination and other matters. The Board member suggested that these were matters for the Board and issued a general invitation for her to present them. She then prepared a document, abstracted to ten pages, identified as Teacher's Exhibit 11, and on August 6th visited the County Superintendent where the exhibit was read and discussed. He advised her that the school board should know about these matters and inquired of her



whether the members of the board were real good friends of the principal and told her that, if they were, the board would be "apt to be tough" on her.

That evening, with two board members and the principal absent, the teacher appeared before the board and read and discussed Exhibit 11 wherein she charged the principal with a lie on mentioned occasions, with posting vulgar signs in his office, with frequently "jumping her", citing examples, with improper supervision of the Seniors on a trip, with improper handling of the activity funds, quoted one teacher as saying that the FFA fund was shorted, that the principal improperly awarded the citizenship award to a boy who had broken and entered the school, with persuading students to take Commerce instead of Home Economics, and then charged the president and secretary of the board with signing papers before they were filled out, and the board with discriminating against her in salary raise. She later showed this document to the two absentee board members, to the school treasurer and discussed it with her own spiritual adviser. Requested to leave this document with the Board, she declined.

At a special meeting on August 31, the Board voted unanimously to ask the teacher to resign and member Sisler "volunteered for the job". He had not been present on August 6th but read the document the following morning when the teacher came to his home. On cross examination he stated that he then told her that if she couldn't prove what she had said, she had better resign or she was in trouble. It was also suggested that she resign on account of health or appear again before the Board for a tape recording of her charges. She refused to resign but apparently indicated a willingness to appear again before the Board.





The teacher began her teaching duties for that year and taught during the month of September. The board met in special session on September 20th, discussed the teacher and found that she had:

- a. Charged the Board with discrimination against her in salary
- b. Told the Board she was not satisfied with \$100.00 for coaching the play when led to believe she would get \$150.00
- c. Charged the president and secretary with being incompetent in signing papers without knowing what they were signing
- d. Accused principal of embezzling money from the activity account saying "the activity fund is very lucrative to the principal"
- e. Charged principal with negligent supervision of the Senior trip
- f. Charged principal with consulting no one in selection of citizenship award
- g. Accused principal of having vulgar signs in the office
- h. Accused principal of bleeding taxpayers by taking a summer job

The Board then found that no proof had been presented on any of the charges and it was their belief that they were, therefore, unfounded and untrue. The meeting was adjourned to September 24 so that teacher could appear and present any charges together with proof of the same.

On September 24 the teacher did not appear but instead sent a letter, and, after referring to the additional pay, said "I do not wish to create any problems as a result of this, and rather than have any more complications, I have decided to accept the offered sum for these services".

The Board in their testimony admitted they had not checked any of the



charges but, nevertheless, in this meeting found that they were malicious and untrue and that the teacher had wilfully spread them in the community. They then adopted a resolution finding that the best interests of the school required her discharge for, (a) insubordination in making and publishing the charges, (b) creating dissension and distrust, and (c) destroying the morale of the school. Suspension forthwith and dismissal as of December 1 followed.

On October 1, the teacher requested a public hearing as authorized by the act and demanded a bill of particulars. Hearing was set for November 23. On November 21, she filed a mandamus suit seeking a bill of particulars and obtained an injunction against the Board forbidding further action in the tenure proceeding until such bill of particulars was furnished. On February 21, 1857, the Board furnished the bill of particulars. Hearings were then held, evidence in part taken, and on May 10th, the tenure proceedings were dismissed without prejudice because instituted at an illegal meeting of the Board. At this same meeting she was advised that she would receive no assignment of duties nor salary until she appeared, and was again notified to appear at the May 16th meeting of the Board. By letter her counsel advised the Board that she would not appear on their advice, that the Board had heard her complaints, that a further appearance was not requested in good faith, and that they were estopped by the dismissal of the charges to charge her again on the same grounds. The record is then silent until August 3 when she filed a second mandamus suit seeking an assignment of duties and salary from the preceding October. The Board answered this complaint and on August 20 again demanded that she appear at its meeting of





August 28th. She obtained an injunction against an appearance which was not served on the Board until the afternoon of the 29th. The Board was advised by counsel that the injunction did not bar the institution of proceedings under the Tenure Act and the instant proceedings were then begun on August 29th. She was charged with insubordination, among other things, for not appearing on September 24th, May 16th and August 28th. The proceedings moved with reasonable dispatch resulting in her dismissal, effective January 2, 1938.

The Teacher Tenure Law was designed to cure then existing evils in our school system by providing a speedy, simple procedure for the dismissal of teachers based on charges, notice, a fair hearing and a speedy judicial review under the provisions of the Administrative Review Act. These benign purposes become obscure in this record. In Lusk v. Community Consolidated School District, 20 Ill. App. 2d 252, we had occasion to say that a teacher is not only entitled to a hearing, she is entitled to a fair hearing, that the administrative agency does not represent one party against the other, 1 Illinois Law and Practice, page 461, and "our study of the record raises a grave doubt that the hearing afforded in this case was the type of hearing which the legislature had in mind when it enacted the Teacher Tenure Law". What we then said of that record we now say of this. In so doing we fully recognize that the factual findings of an administrative tribunal are by statute prima facie correct, that we are not concerned with the wisdom of the decision, and that the decision of an administrative agency will be set aside only where the same is without substantial support in the record or is manifestly against the weight of the evidence. Keys v. Board of Education,



20 Ill. App. 2d 504; Pearson v. Community Unit School District No. 5, 12 Ill. App. 2d 44. We are thus circumscribed and inhibited by these rules when it may be said that a fair hearing was held. We do not understand that they circumscribe or inhibit us from determining whether the hearing, as conducted, was fairly conducted within the purpose, intent and principles of the Teacher Tenure Law.

Other States have been confronted with the unique problem here confronting us. "The anomaly in procedure which permits the board of education to serve in the triple capacity of complainant, prosecutor and judge makes it vitally necessary that in reviewing administrative decisions courts zealously examine the record with a view to protecting the fundamental rights of the parties." State ex rel Steele v. Board of Education, 252 Ala. 254. In discussing dual functions similar to those here, Judge William J. Brennan, Jr. (now Justice of the United States Supreme Court) had this to say: "The substantiality of evidence must take into consideration whatever in the record fairly detracts from its weight", In re Larsen, 17 N.J. Super. 564, and held that the implications arising from the merger of functions could be so considered. In the case before us now, we deal not with a dual role, not with a triple role, but with the quadruple roles of complainant, prosecutor, judge and witness in a single tribunal. Our Supreme Court once said of a similar statute that, "a statute which compels a litigant to submit his controversy to a tribunal of which his antagonist is a member makes his antagonist his judge and does not afford due process of law". Commissioners of Drainage Dist. No. 1 v. Smith, 223 Ill. 417. It is beyond the perimeter of our jurisdiction to question the validity of the statute here involved or the authority of





the Board to proceed under it. It is within the perimeter of our jurisdiction, and it is our duty, to determine whether this record had its birth in a fair hearing, before an impartial tribunal within the principles, purposes and intent of the Teacher Tenure Law. We, therefore, examine the picture painted by this record, recognizing that "the purpose of judicial review of any administrative agency is to keep that agency within the judicial bounds prescribed by law and to guard rights guaranteed by the Constitution and Statutes". Curtis v. State Police Merit Board, 349 Ill. App. 448; Gigger v. Board of Fire & Police Commissioners, 23 Ill. App. 2d 433

Most of this record was occupied with proof of what the teacher actually said and what her Exhibit 11 actually contained and whether any of the charges were true. These questions had already been determined by the Board in its meetings of August 31, September 20, and September 24, and the judicial flavoring of the Tenure hearing came from the lips of board member Hsaler on page 28 of the record in these words, "I had a right to object to them (the teacher's charges) and if she couldn't prove it, she is out and that is what we are asking for." It is quite apparent from this record that from the beginning the ultimatum of the Board was that the teacher resign, or tape record her charges, or prove them to be true, or withdraw them. Most of the teacher's charges were in the area of honest disagreement and not uncommon in school administration. The principal ones not in that category, are the charge of incompetence of the board in signing papers, and the charge of embezzlement. Neither of these charges appear in her Exhibit 11 and she specifically denied having ever made either of them.



The Board's witnesses testified that she used the words "lucrative to the principal" in referring to the activity fund. This she specifically denied and it does not appear in Exhibit 11. The Board accepted the use of the word "lucrative" as true and then piled innuendo on innuendo to find that the teacher charged the principal with embezzlement by finding that the word "lucrative" implies stealing or theft and these words in turn imply embezzlement. Much doubt exists as to whether the word "lucrative" was ever used by the teacher. On the first hearing neither the treasurer nor the County Superintendent testified to its use. On the second hearing they did. In its findings the Board takes notice of this, excuses the treasurer and finds that she was ill at ease on the first hearing and more at home on the second, and then states: "The Board believes her testimony at this hearing and so finds." A like finding exonerates the County Superintendent of Schools from failing to so testify on the first hearing. As to its members' testimony, the Board's findings are: "the Board believes the testimony of the witnesses and the Board members in this regard and so finds". Concerning the injunction issued by the Circuit Court forbidding the Board to require her appearance on August 28, (with no tenure proceedings pending), and to justify this refusal as one act of insubordination warranting dismissal, the Board employs some mental gymnastics in these words: "she had no right to try to avoid appearance by such or any other means--it was a violation, therefore, of her duty to this Board to seek to avoid appearance by means of an injunction, and this Board so finds, and having chosen duty to herself in preference to her duty as a teacher, she must accept the consequence of that choice". Even a grade school student in this same school system would be astounded at this lack of respect for a judicial order. With one minor exception, there isn't a single line of testimony that the teacher repeated any





of these charges publically but only to school administrative personnel and her spiritual adviser. In its findings the Board says, "The Board does not have before it evidence that teacher has specifically repeated her charge of theft since the former tenure proceedings were instituted but does find that she did charge theft against the principal as found herein, and that her failure and refusal to disavow such charge until the occasion of the present hearing have amounted in law and in fact to a continuous republication of the same". More is shown by this record, but enough has been said to question whether this was the fair hearing before an impartial tribunal called for by the Teacher Tenure Act.

In this atmosphere it is not surprising that a mandamus action was necessary two days before the first hearing was to begin, to obtain a bill of particulars and that three months elapsed before they were finally furnished. In this atmosphere it is not surprising that the second tenure proceedings were not instituted until 111 days had elapsed after the termination of the first, and a second mandamus action was pending against the board. In this atmosphere it is not surprising that the teacher received no compensation from the date of her first suspension and no assignment of duties. In this atmosphere it is not surprising that no patron or student was called to establish that the best interests of the school required the teacher's dismissal so that that conclusion of the Board could be judicially appraised. As was said in Compton v. Board of Education, 8 Ill. App. 2d 243, "At this point it may be observed that there is no evidence of any pupil or parent complaints or dissatisfaction with the plaintiff." Nor is it surprising that more than fifteen months elapsed before the final discharge of the teacher on January 2, 1958, notwithstanding that the statute requires at least sixty days notice of the charges be given the



teacher and that, "the hearing shall be held and the decision rendered within said sixty days." By simply filing a bill of particulars the Board could have avoided the first mandamus suit and the three months delay thereafter. By instituting the second proceedings in May of 1957 as they threatened, instead of waiting for a second mandamus action to bestir them to action, procedure more in keeping with the Tenure Act would have resulted. Some time was consumed by mutually agreed upon continuances, but the time within which the Board was free to act was far beyond the sixty days contemplated by the act. It is small wonder that the trial court observed that, "this proceeding does not conform with the court's conception of justice as we have come to know the same in this Country".

Because of the nature of the petition for re-hearing we have gone to some lengths in an attempt to clarify our views. Our colleagues in the Fourth Appellate District have had occasion in a situation somewhat akin to this to speak forcibly about the character of administrative hearings and said, "--- a hearing before an administrative agency should not be a partisan hearing with the agency on one side arrayed against the individual on the other---. It is imperative that the record of an administrative hearing show that an impartial inquiry into the facts was conducted. It should never appear, as it does in this case, that the procedure was aimed primarily at proving the guilt of the plaintiff." Gigger v. Board of Fire and Police Commissioners, 23 Ill. App. 2d 433 (cited above). The teacher's conduct here is far removed from that of the teacher in Keyes v. Board of Education, 20 Ill. App. 2d 504, and Jepson v. Board of Education, 19 Ill. App. 2d 204, where the teacher's complaints were voiced publicly in the one instance; and at a teacher's institute in the





other. Here the teacher spoke only to her employer and administrative officials of the school, and to her spiritual adviser. Here the controversy was within the administrative walls of the school and, should have been there resolved-- the patrons, the public and the pupils of the school were not involved. Her appearance was suggested by a board member and approved by the County Superintendent of Schools. That the Board was offended by teacher's complaint is evident in the minutes of its September 24 meeting which recites "statements regarding the principal's and Board's competence are things which definitely undermine the school." Having impulsively and capriciously requested the teacher's resignation, the Board could only stand by its guns and attempt to build a record for dismissal. Her letter of September 24 does not imply insubordination but a willingness to drop the matter. Her failure to appear on May 16th after the first proceedings were dismissed without prejudice was on advice of counsel and cannot be regarded as wilful insubordination to an employer who refused either to pay her or assign her duties. Her failure to appear on August 28th, after waiting 111 days for a determination of status, was approved by a Circuit Court injunction and can scarcely be, indeed cannot be, considered insubordination. They charged her with insubordination in failing to assist them in investigating her complaints, in an investigation which, by their own statements, they had never instituted. The trial court correctly concluded that a finding of insubordination, creation of dissension, destroying morale, and publishing untrue charges, found no substantial support in the evidence. For this reason, and for the further reason, that the hearing disclosed by this record, as conducted, was not in keeping with ordinary concepts of American justice nor within the spirit, intent, principles or the letter of the Tenure Act, the judgment of the trial court should be affirmed, and it is affirmed.

AFFIRMED



DOVE, J. Dissenting.

In the majority opinion it is stated that the finding of the board of education in this case that the teacher was "guilty of insubordination, guilty of creating dissention, guilty of destroying morale and guilty of publishing untrue charges finds no substantial support in the evidence" and that the Hearing disclosed by this record was not in keeping with ordinary concepts of American justice, nor within the spirit, intent, principles or the letter of the Tenure Act.

As I am unable to concur in these findings and conclusions I shall set forth in considerable detail what this record discloses, recognizing, however, that I am restating or repeating considerable portions of the evidence as set forth in the majority opinion.





It appears from the record that appellee is a teacher by profession having taught since 1943 and has received a degree of Master of Arts. She is married and lives with her husband and one daughter. In August, 1954 she was employed by appellant and taught vocational home economics in its schools during the school years 1954, 1955, 1956 through 1957. On August 29, 1957 she was notified by appellant of her dismissal but the order did not become effective until January 2, 1958. On January 28, 1958 the instant petition for review was filed in the circuit court.

The record discloses that appellee had supervision of and directed, a class play in 1954 for which she received \$50.00 extra compensation. In April 1956 she directed another class play for which service, according to her testimony, she was to receive \$150.00 extra compensation. On July 3, 1956 appellee called the secretary of the Board of Education, Marvin Ioder and requested him to stop at her home on his way to the July meeting of the board and inquired of him why she had not received \$150.00 for directing the play. Mr. Ioder informed appellee he knew nothing about it and told her he would take it up with the board which met that evening. The next morning Marion Ahrens another member of the Board of Education was at the home of appellee and told her <sup>he thought</sup> there was a misunderstanding about the amount she was to receive for directing the play. According to her testimony she told Mr. Ahrens that she thought it was another misrepresentation by Mr. Lyle Morgensen, the principal of the school. Mr. Ahrens inquired of her what other misrepresentations had been made and suggested that the members of the board of education should be advised about this and invited her to come to the next board meeting on August 6, 1956.



On August 6, 1956 the Board of Education held its regular monthly meeting. Messrs. Ahrens, Ioder, Ogan, Townsend and Evans were present. Messrs. Piper and Sisler the two remaining members of the board and also Mr. Morgensen, the principal were absent. Appellee was present and the minutes of the board state that at this meeting the board heard the complaints of appellee, the Home Economics teacher.

What was said and done at this and subsequent meetings of the board furnish the basis for the action of the board in dismissing plaintiff as a teacher. What transpired at these meetings, according to the testimony of those in attendance, is set forth in the 965 page record, condensed in the abstract to 448 printed pages. At the meeting of August 6, 1956 plaintiff read a statement which she had prepared. When she had finished reading therefrom she was requested to leave it with the Secretary of the Board but she declined.

Upon the hearing plaintiff testified that the original document from which she read at the board meeting on August 6, 1956 was prepared by her on the afternoon of that day and was a statement which set forth her grievances. She further testified that after she prepared it she went to the office of Floyd French, County Superintendent of Schools of Bureau County, submitted the statement to him, and asked his advice and he told her he thought the school board should know what was in the statement and inquired of her whether the members of the board of education were real good friends of the principal, Mr. Morgensen, and told her that if they were, the board would be "apt to make it tough" on her.

Plaintiff further testified that on September 21, 1956 she received a letter from the board asking her to appear at a board meeting





to be held on September 24, 1956; that she intended to do so and in order that each board member could have a copy of a statement of her grievances she and her sister prepared about ten copies of the statement which she had read to the board at its meeting on August 6, 1956 and that after so doing the original was destroyed. One copy of this statement was introduced in evidence by the plaintiff and is referred to in the record as Teacher's Exhibit No. 11. Plaintiff testified that this exhibit was an exact copy of the statement which she read at the August 6, 1956 meeting and which she had previously discussed with Mr. French and later with Mr. Sisler and Mrs. Neisenheimer.

This statement covers eleven pages of the printed abstract. Her complaints or grievances as enumerated were: (1) that she had been discriminated against in respect to salary; (2) that she did not wish to bleed the community by drawing income from the taxpayers from two different jobs at the same time, as Mr. Morgensen, the principal, had done the past summer; (3) that Mr. Morgensen, the principal lied to her when he told her what a Mr. Cordell had said about having her adult classes in the afternoon; (4) that this falsehood of the principal was not the only one he had told her, <sup>that</sup> she would never know how many but she had begun to check; (5) that upon one occasion Mr. Morgensen, the principal, "came raging into her class room" and inquired whether she had forgotten that she had the study hall and stated that "the kids" were running around wild; that she immediately went to the study hall found Mr. ~~Ewald~~ at the desk and he told her everything had been quiet and that the kids had not been running around wild; (6) that Mr. Morgensen, the principal, had told her she would receive \$150.00 if she would direct the class play but she should have known that she couldn't



and believe him / that she was returning the \$100.00 check which was an incorrect amount which she had received for this service; (7) that the principal had "jumped" her (a) for spending more money this year than last year, (b) in connection with the community achievement project, the school lunch program and getting out the report cards promptly.

In this statement, as read by plaintiff, she told how arduous her duties were; that she worked morning, noon and night directing the class play; that one of the other teachers received \$174.50 more per year than she did; that she had "neither spared myself personal expense nor effort" to help the school and the principal; that the F.H.A. school project sponsored the school paper in the local newspaper and she devoted much time in typing the copy every week; that the principal was wrong when he didn't think there would be enough interest in a dancing lesson project inasmuch as more than one hundred enrolled and the project was most successful; that she had worked many nights with the juniors in their activities and as a result of her work it was a lovely affair and inexpensive, her decorating expense being \$70.00 while a similar affair in a neighboring town cost \$500.00. She then concluded:

"Al Liehr was the first one to tip me off to watch the F.H.A. fund - that the F.F.A. was shorted, he said. Mr. Cordell said that he ran into the same situation. Mr. Morgensen usually comes around before you have a chance to count the money after the various functions and says, 'Oh, don't bother about counting the money, I'll count it in the morning'. However, Mrs. Burgess did count after the basket ball games and she felt the class which she sponsored didn't get nearly the credit it should have received. Don't you think that there should be a receipt given for money handed in? A simple way to check would be to have an honest high school secretary. ----- A secretary would be more beneficial than the 'spy system'. ----- I should like to know if you men feel any social justice when every other teacher in both the grade and high school receive at least \$200.00 or more increase in salary and you are discriminating against me and asking me to do more for less?"





Plaintiff did not attend the meeting of the board on September 24, 1956 but wrote a letter to Mr. Lober, a member stating that the only reason she appeared before the board at its meeting on August 6, 1956 was her understanding that she was to receive \$150.00 for directing the class play; that she did not wish to create any problems and rather than have more complications she had decided to accept the offered sum of \$100.00.

Following the meeting of August 6, 1956, a special meeting of the board was held on August 31, 1956 at which the minutes of the board reflect that there was much discussion of the complaints made by plaintiff at the previous meeting, and the board, by unanimous action, requested plaintiff to resign. Another special meeting of the board was held on September 20, 1956. The minutes of the meeting reflect that all members were present and enumerates eight charges which the minutes state plaintiff had made at the August 6th meeting. The fourth one of these is that plaintiff "accused Mr. Lyle Morgenson of embezzling money from the activity account for his personal gain. Mrs. Ramona Eidenmiller, teacher, said the activity fund is very lucrative to the principal." The minutes go on to state that plaintiff had told Mr. Sisler, a board member, that she would come before the board and read her charges in the presence of the principal and the board adjourned until September 24th in order to hear plaintiff's charges and her foundations therefor.

As stated plaintiff did not attend the September 24th meeting and the board adopted a resolution which recited that plaintiff had made serious charges against the principal and members of the board of education without foundation, had published such charges to the people of the community, had created distrust and dissension between herself, the principal, members of the board, students of the school and the people of the community and had destroyed the morale of the school and its educational program. This resolution suspended plaintiff from her duties as a teacher and the



secretary was directed to notify her that her employment would terminate on December 1, 1956.

Subsequently the defendant board dismissed and removed plaintiff as a teacher effective November 15, 1957 and duly notified her of the reasons and causes for her dismissal. Thereafter by stipulation of the interested parties the effective date of plaintiff's dismissal was fixed at January 2, 1958. Plaintiff demanded a public hearing as provided by the Teacher Tenure law which was had. At this hearing the parties were represented by counsel. Plaintiff testified in her own behalf and also her sister, Mary Eileen Crock. James Cordell a teacher in this school during the school year 1955 and 1956 and Albert Liehr who was a vocational educational instructor in this school from February 1952 to June 1955 were called as witnesses by plaintiff. Both of these gentlemen were referred to in the document prepared by plaintiff on the afternoon of August 6, 1956 and from which the plaintiff testified she read at the board meeting that evening.

Messrs. Ahrens, Evans, Ioder, Ogan, ~~Stuber~~ and Townsend, all members of the board of education in attendance at the meeting of August 6, 1956, testified that plaintiff, in presenting her charges of grievances to the board, that evening apparently read from a document which she had prepared with her. The several witnesses recalled the charges which she made and all testified that in addition to those charges set forth in Teacher's Exhibit No. 11 plaintiff also said that the funds of the school need to be watched; and that the activity fund was lucrative to the principal, Mr. Morgensen.

Floyd French, County Superintendent of Schools of Bureau County, testified that he recalled the occasion when plaintiff visited him in his office and requested him to read a statement of her charges which she had prepared and his testimony was that it mentioned "that the principal had mishandled funds" and that plaintiff there said "the school funds had been used in a manner lucrative to the principal and I think it was brought out that school money had not been properly accounted for".





Violet Meisenheimer testified that she was school treasurer of this school district; that on August 27, 1956 plaintiff came to her home; that Mrs. Meisenheimer's daughter was a student at this school and was present upon this occasion; that plaintiff brought a statement of the receipts and expenditures of the 1955-56 school year for the F.H.A. and the budget for the coming year was discussed; that plaintiff told the daughter of this witness at that time in the presence of this witness, "that whenever she had any money coming in for that organization she should count it very carefully before turning it over to Mr. Morgensen because she was informed that the funds of other teachers had been tampered with". This witness further testified that Mr. Morgensen had told her she would receive \$150.00 for coaching the class play; that the board sent her \$100.00 and she then went to Morgensen and talked to him about it and he denied that he ever told her she would receive \$150.00; that Morgensen had lied to her and that this occasion was not the first time he had lied to her.

Mrs. Meisenheimer further testified that two days later, on August 29, 1956 she went to plaintiff's home with the budget which she had prepared and there plaintiff handed her what she called a treatise and asked her to read it; that she did so, and as abstracted this witness continued: "I read this treatise which consisted of several typewritten pages. It contained incidents in which she said that Mr. Morgensen had lied to her, or in some way made things unpleasant for her and it was hard work when you felt that his office wasn't back of you. She said the board was discriminating against her because they were raising some of the teachers but her not sufficiently. She mentioned the shortage of funds again and said that Mr. Lihl had told her first and then Mr. Cordall that the funds were short.-----I don't remember a mention of a specific fund. I do remember reading that funds of other teachers had been tampered with, and that the funds were very lucrative to the principal. I asked if Mr. Morgensen was present at the meeting where she read this paper and she said, 'No, he wasn't. I wish he had been. I don't know why he wasn't there'."





George Sisler testified that he was a member of the board of education and had been for six or seven years; that he was not present at the August 6, 1956 meeting but that the following morning plaintiff came to his home, had a lengthy typewritten statement which she stated was the same document she had read to the board the night before and wanted him to read it. He testified that she made an accusation against the principal embezzling funds and also and that other charges. She said the athletic funds were handled in such a manner it was lucrative to the principal. Upon cross examination the witness stated that in this conversation he told the plaintiff that if she couldn't prove what she had stated that she had better resign or she was in trouble.

Francis Piper testified that he was a member of the board of education but did not attend the board meeting on August 6, 1956 but stated that several weeks thereafter plaintiff met him on the street and she showed him a document and requested that he read it. He glanced at it, testified it was a document similar to the one referred to by the other witnesses but he did not read it and had no recollection of its contents.

Upon the hearing the plaintiff testified that after receiving a letter from the board on September 21, 1956 asking her to appear at the meeting of the board on September 24, 1956 she and her sister, Mary Kileen Crock, typed on a ditto machine exact copies of the statement plaintiff testified she read at the August 6th meeting of the board. which she afterward exhibited to Mr. French, Mr. Sisler and Mrs. Meisenheimer; that subsequently all these copies were burned by her husband except one; that she thought all of them had been destroyed but after she had been notified of her suspension and dismissal she learned that her sister had taken one with her and her sister then gave it to her and it was produced on the hearing as stated, by her and, is identified in the record as Teacher's Exhibit No. 11.



Plaintiff further testified that at the board meeting on August 6, 1956 statements were made by her in addition to what she read from her prepared document; that questions were asked her by the board members which she answered and that there was a general discussion of the matters referred to in her statement and that upon her return home she made notes of what transpired. She testified that at this meeting she did not say that the activity fund had been lucrative to the principal or to Mr. Morgensen and denied that she used the word lucrative in connection with the F.H.A. fund or any other fund.

Mrs. Crock testified that she is plaintiff's sister and that between September 20th and September 24th, 1956 she typed on ditto paper what plaintiff said to the school board on August 6, 1956<sup>2</sup> that what she typed was taken by the plaintiff to the school where copies were made; that she retained one copy and the witness identified Teacher's Exhibit No. 11 as a true copy of what she typed.

James Cordell testified on behalf of plaintiff that he had taught in this school during the 1955-56 school year and had something to do with handling the funds of the F.F.A. activities; that this fund consisted of money which the students received from the sale of popcorn and from a steam cleaner<sup>and</sup> that the student treasurer would turn the receipts over to him. This witness further testified that upon one occasion, at a football game, Mr. Morgensen requested that the witness turn the money over to him and he did so without taking a receipt therefor; that he did not recall any conversation with Mr. Morgensen in which the manner of handling these funds were ever discussed but did recall one time when the receipt Morgensen gave him was \$2.00 or \$3.00 short of the amount he had given the principal; that he talked to Morgensen about this and Morgensen explained it to him and he thought nothing further about it. This witness further testified that sometime

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in July, 1956 plaintiff asked him if he ever questioned the amount of money he had turned in to Morgensen for F.F.A. and he told plaintiff about this one incident but never accused Morgensen or anyone else of tampering with the funds of the school. He further testified that the only thing he didn't like was not being able to count the money before he turned it in to the principal.

Albert Liehr was the only other witness called by plaintiff. He testified that from 1952 to 1955 he was vocational education instructor in this school and at that time had charge of the Future Farmers of America funds; that the students sold popcorn at football and basketball games and the student treasurer turned the proceeds of the sales over to him and he delivered the money to the principal who usually gave him a receipt which he delivered to the student treasurer. This witness further testified that he never had any occasion to discuss the manner of handling these funds with the plaintiff and didn't recall that he ever did so.

The foregoing is a fair resume of the evidence found in this record. The charges preferred by the board upon which plaintiff requested and was granted a hearing were set forth very fully and completely in the notice given plaintiff. These charges accused plaintiff of appearing before the board of education on August 6, 1956 and making the following statements:

1. That the board discriminated against her as to salary.
2. That the president and secretary of the board signed papers without knowing what they were signing.
3. That the activity fund is very lucrative to the principal.
4. That the principal was negligent in supervising the senior class trip.
5. That the principal failed to consult anyone when he selected the winner of the citizenship award.
6. That the principal placed vulgar signs in his office.
7. That the principal was guilty of "bleeding" the taxpayers by working during the summer.



Plaintiff was also charged with insubordination and breach of duty as a teacher when she failed, after being requested by the board, to attend its meetings on September 24, 1956, May 16, 1957 and August 28, 1957 and also when she failed to give the board any evidence or information she had touching the charges she made to the board at its meeting August 6, 1956; that she was also guilty of breach of duty as a teacher when she made the charges she did against members of the board of education to persons other than members of the board and also to the members of the board when she knew those statements were untrue. The charges concluded that the board of education was of the opinion because of the unprofessional attitude of plaintiff toward the members of the board her failure to cooperate, her statements and conduct as set forth in the charges preferred against her, that the best interests of defendant school district required her dismissal as a teacher.

At the conclusion of the hearing the defendant found that there was no irregularity in the handling of the activity funds by the principal; that the funds were not lucrative to him and that the hearing fully and completely established his honesty and integrity. The board further determined that the best interests of the school district required the removal of the plaintiff as a teacher and unanimously found the plaintiff guilty of unethical and unprofessional conduct in the following particulars, viz:

- (a) By appearing before the board at its August 6, 1956 meeting and making the charges and accusations she did having no foundation for the same;
- (b) By giving the statement prepared by her and containing these accusations and charges to Messrs. French, Sisler and Mrs. Weisenheimer;
- (c) By refusing to appear before the board when requested by the board to do so at its meetings held September 24, 1956, May 16, 1957 and August 28, 1957;





- (d) By stating that the activity funds of the school were lucrative to the principal thereby accusing the principal of her school with theft and tampering with the activity funds of the school and
- (e) By failing and refusing to disavow any of these charges which she had made until she did so upon the hearing.

At the conclusion of the hearing in the trial court this cause was taken under advisement. Thereafter the trial court in disposing of the case, filed a letter he had written counsel for the respective parties setting forth his conclusions and reasons therefor. In this letter the court stated that in spite of the multiple nature of the charges against the teacher, the decision of the board rested solely on the finding that the best interests of the school required the dismissal of the teacher. The court said that there is no basis in the evidence for this conclusion and that "such a finding can only be attributed to malice on the part of the board members or to the fact that the board acted impulsively or capriciously. This proceeding" continued the court, "does not conform with the court's conception of justice as we have come to know the same in this country, but more nearly resembles a proceeding related to a foreign ideology. Here the board of education were the accusers; the board prosecuted the charges; the board sat as members of the jury; and each member of the board stepped down as a member of the jury, one by one, and was sworn, and testified as a witness, and then resumed his role as a juror".

Among the powers granted a board of education is to dismiss or remove a teacher whenever in its opinion, the interests of the school requires such dismissal. (Ill. Rev. St. 1959, Chap. 122, Art. 7 sects. 14; 16) The procedure to be followed in the removal of teachers under the Tenure Act is set forth in the School Code, (Ill. Rev. St. 1959, Chap. 122, Art. 24). Appellee had entered upon contractual continued service and her





dismissal could not become effective until approved by a majority vote of all members of the board upon specific charges and after a hearing, if a hearing is requested in writing by the teacher within ten days after the service of notice of the charges preferred against her. (Ill. Rev. St. 1959, Chap. 122, Art. 24, sec. 3) In the instant case appellee requested a hearing and it was had. She was present and represented by counsel of her own choice. The witnesses who testified on behalf of both parties and those who testified were called, sworn, examined and in support of the charges were cross-examined by her counsel. Plaintiff heard the testimony of the several witnesses and she was sworn and testified as were three other witnesses called by her. Plaintiff was afforded every opportunity to present her defense to the charges made against her and after the board had unanimously voted that the best interests of the school required her dismissal she invoked the provision of the statute and sought and obtained a review of the record as provided in the School Code. (Ill. Rev. St. Chap. 122, Art. 24, sec. 8).

Appellee concedes that the procedure outlined by the statute was observed in the instant case. Where a board of education follows the procedure required by the Tenure Act, which is a valid enactment of the legislature of Illinois, it certainly cannot be said, with any justification that to do so resembles a proceeding related to a foreign ideology. If appellee's rights were not fully preserved and protected in this statutory proceeding the relief must be directed to the legislative branch and not the the judicial branch of our government.

We agree with counsel for appellee that a tenure teacher is entitled to a fair hearing; that her dismissal must be based upon competent and sufficient evidence; that such a teacher is not to be dismissed because of the personal ill-feeling of anyone, citizens or board members, but her dismissal must be based upon competent and sufficient evidence. We agree, too, with counsel for all parties that some of the statements made by the

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BY SAMUEL JOHNSON

IN TWO VOLUMES

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THE SECOND PART OF THE HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND

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BY SAMUEL JOHNSON

IN TWO VOLUMES

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THE THIRD PART OF THE HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND

IN THE REIGN OF HENRY THE EIGHTH

BY SAMUEL JOHNSON

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THE FOURTH PART OF THE HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND

IN THE REIGN OF HENRY THE EIGHTH

BY SAMUEL JOHNSON

IN TWO VOLUMES

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THE FIFTH PART OF THE HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND

IN THE REIGN OF HENRY THE EIGHTH

BY SAMUEL JOHNSON

IN TWO VOLUMES

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THE SIXTH PART OF THE HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND

IN THE REIGN OF HENRY THE EIGHTH

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THE SEVENTH PART OF THE HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND

IN THE REIGN OF HENRY THE EIGHTH

BY SAMUEL JOHNSON

IN TWO VOLUMES

LONDON: Printed by J. B. G. 1791

teacher in the instant case were frivolous, trivial and captious and would form no basis for her dismissal but there is nothing, in this record which leads ~~the writer of this dissent~~ to conclude that the board of education acted maliciously impulsively or capriciously.

It is unnecessary for us to determine in the instant case whether the principal told appellee that she was to receive \$100.00 or \$150.00 for directing the class play. Appellee testified that the principal told her she was to receive \$150.00. The principal testified he did not. Appellee, without mincing words, stated that the principal had lied and returned the check for \$100.00 which she received but which she later accepted. Neither is it necessary for us to determine whether Teacher's Exhibit No. 11 is an exact copy of the statement or document from which appellee read at the August 6, 1956 meeting of the board. This exhibit does not say anything about the activity fund being lucrative to the principal and appellee testified she never said anything about the activity funds being lucrative at the board meeting of August 6, 1956. Her testimony in this respect, however, is uncorroborated and is at variance with the testimony of Messrs. Ahrens, Ioder, Ogan, Townsend and Evans, members of the board of education and her testimony is also in conflict with that of Mr. French, the county superintendent of schools, Mr. Sieler, and Mrs. Meisenheimer. Furthermore appellee did not refute the testimony of Mrs. Meisenheimer to the effect that appellee told the daughter of this witness, who was then student treasurer of the F.H.A. fund, that whenever she had any money belonging to that organization she should count it very carefully before turning it over to the principal, Mr. Morgensen, because she had been informed that funds of other teachers had been tampered with.





One of the charges preferred by the board against appellee was that at the meeting of the board held on August 6, 1956 she "accused Lyle Morgensen the principal, with embezzling money from the activity fund for his private gain, saying that 'the activity fund is very lucrative to the principal'." At the conclusion of the hearing the board found specifically that appellee did state that the activity funds of the school were lucrative to the principal. The board also found that these funds were, not lucrative to the principal; that the honesty and integrity of the principal was fully and completely established at the hearing and that there was no irregularity in handling these funds by the principal.

The question presented then arises is there any evidence in the record to support these findings. Plaintiff testified that she did not say that the activity funds had been lucrative to the principal and denied that she used the word lucrative in connection with any of the funds of the school. Her testimony in this respect is uncorroborated and is in conflict with the testimony of five witnesses. The evidence of these five witnesses is corroborated by the testimony of Mr. French, Mr. Sisler and Mrs. Meisenheimer and by other facts and circumstances found in this record. Lucrative means profitable or remunerative. The only reasonable deduction which follows from all the evidence found in this record in this connection is that plaintiff used the words specified in the charge and meant to convey thereby that the principal of her school derived a personal profit from handling the activity funds of the school or that the manner in which he handled those funds was remunerative or profitable to him.

There was nothing wrong or unprofessional for plaintiff to attend the meeting of the board of education on August 6, 1956 and there discussing with the board her grievances. If it was true, as stated in her letter to the

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board in reply to its request for her to attend the subsequent meeting of the board held on September 24, 1956; that the only reason she attended the prior meeting on August 6, 1956 was to inform the board that she understood she was to receive \$150.00 for directing the class play, she went to extreme lengths to do this and her prepared statement related to many other subjects. From a consideration of all the evidence found in this record the conclusion is inescapable that this teacher believed the principal of her school was untruthful and dishonest and her presence at the board meeting on August 6, 1956 was to so inform the board of education.

Had her purpose been otherwise she would have had no reason to refuse the requests of the board to attend its meetings on September 24, 1956, May 16, 1957 and August 28, 1957. She knew what she had said to the board and if she honestly believed that she was to receive \$150.00 for directing the class play the means she took to obtain that amount was not commendable. She knew that the other matters which she <sup>admits she</sup> brought to the attention of the board merited little, if any, consideration. She knew she had not been discriminated against as to salary; that the principal was not subject to criticism in connection with his supervision of the class trip or his conduct in selecting the winner of the citizenship award or the vulgar signs which she said were in the office of the principal. Her accusation that the principal was bleeding the taxpayers by accepting summer employment and her charge that the officers of the board signed papers not knowing their contents were unfounded.

In *Meredith v. Board of Education*, 7 Ill. App. 477 the court said: (p. 486) "The best interest of the school of the district is the guiding star of the board of education and for the courts to interfere with the exercise of the powers of the board in that respect is unwarranted assumption of authority and can only be justified in cases where the board has acted maliciously, capriciously and arbitrarily".

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In Jepsen vs. Board of Education, 19 Ill. App. 2d 204 this court stated that in a case of this character it is for the board of education to determine in the first instance what in its opinion is cause for dismissal but it may not make an arbitrary and unreasonable rule in this respect. The court quoted from Murphy v. Houston 250 Ill. App. 385 where the word "cause" was defined to mean "some substantial short coming which render continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as good cause for his not longer occupying the place".

As said in Keyes vs. Board of Education, 20 Ill. App. 2d 504 the scope of our review is limited to determining whether the decision of the board of education in dismissing appellee as a teacher finds support in the evidence. The discretionary power to determine whether the best interests of the school required appellee's dismissal is vested in appellant. The trial court or this court is not authorized to interfere with the exercise of this power by the board of education unless the decision of the board is without substantial foundation in the record or manifestly against the weight of the evidence.

The power to dismiss any teacher is lodged with the board of education. And whenever, in its opinion the teacher is not qualified to teach, or whenever in its opinion, the interests of the school require it the board may exercise this power. These are specifications of causes in addition to incompetency, cruelty, negligence, immorality and lack of qualifications. (Hartman vs. Board of Education 356 Ill. 577, 191 N.E. 279) Such authority vests in the board a discretion "traveled only by proof of that discretion's abuse". (Muehle v. School District, 344 Ill. App. 365, 100 N.E. 2d 805,807).





My colleagues recognize that, upon review the findings and conclusions of the board of education shall be held prima facie true and correct. It is only where its decision is without substantial foundation in the record or manifestly against the weight of the evidence that the same will be set aside. (Pearson vs. Board of Education 12 Ill. App. 2d 44, 138 N.E. 2d 326.) A review of this voluminous record, discloses that the order of appellant dismissing appellee as a teacher is not only not against the manifest weight of the evidence but is abundantly supported by the record. In my opinion the trial court erred in reversing the decision of the board of education and therefore the judgment of the circuit court of Bureau County should be reversed.



28th 7  
Abstract

1st DIVISION

General No. 11401

Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

October Term A.D. 1960

COPY

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FILED

DEC 6 - 1960

PAUL V. WUNDER  
Clerk Appellate Court Second District

THE LINDERME TUBE CO., A Corporation,

Plaintiff-Appellee,

vs.

MO-BAR HYDRAULICS, INC., A Corporation,  
and  
MO-BAR HYDRAULIC SALES CO., A Corporation,  
Defendants.

Appeal from the  
Circuit Court of  
McHenry County.

MO-BAR HYDRAULIC SALES CO., A Corporation,  
Defendant-Appellant.

28 I.A. 963<sup>2d</sup>

DOVE, J.

This was an action brought against the defendants, Mo-Bar Hydraulics, Inc., a corporation, and Mo-Bar Hydraulics Sales Company also a corporation, to recover \$2135.04 the alleged purchase price of a quantity of aluminum tubing sold by plaintiff to the defendants. Defendant, Mo-Bar Hydraulics, Inc., answered the complaint admitting its indebtedness to the plaintiff. The other defendant, Mo-Bar Hydraulics Sales Company, by its separate answer, denied the allegations of the complaint. The issues made by the pleadings were submitted to the Court for determination, resulting in a judgment in favor of the plaintiff and against both defendants

1st DIVISION

10/1/1901

October 1, 1901

10/1/1901

IN THE

COURT OF THE DISTRICT OF COLUMBIA

SECOND JUDICIAL DISTRICT - FIRST DIVISION

October 1, 1901

FILED

10/1/1901

PAUL A. WUNDER  
District Attorney, Second District

Special Agent in Charge

Circuit Court of

District of Columbia

THE DISTRICT OF COLUMBIA

OFFICE OF THE DISTRICT ATTORNEY

vs.

WILLIAM W. WILSON, JR., a Corporation

and

WILLIAM WILSON JR., a Corporation

WILLIAM WILSON JR., a Corporation

Defendants-Appellants

Case No.

This was an action brought against the defendants, William

Wilson, Jr., a corporation, and William Wilson, Jr., a corporation, and

a corporation, to recover \$150,000 the alleged purchase price of a quantity

of aluminum tubing sold by plaintiff to the defendants, and

to the plaintiff, and, against the defendants, and the plaintiff,

to the plaintiff, and other defendants, and the plaintiff, and

if the plaintiff should be entitled to the recovery of the purchase price

of the aluminum tubing sold by plaintiff to the defendants, and

resulting in a judgment in favor of the plaintiff and against both defendants



for \$2,135.04 and costs. To reverse this judgment the defendant, Mo-Bar Hydraulics Sales Company appeals.

The record discloses that Everett Barrett was Vice-President and purchasing agent of Mo-Bar Hydraulics Inc. In January, 1958 he ordered a quantity of 29/64 inch aluminum tubing from the plaintiff which was shipped by plaintiff on or about February 13, 1958. This tubing was delivered to a sub-contractor of Mo-Bar Hydraulics Inc., in Crystal Lake, Illinois. The instant action is to recover the purchase price of this material.

The only witness who testified was Jack L. Modrich. He testified that in December 1957 and during January and February, 1958 he was the president of Mo-Bar Hydraulics, Inc., and also president of Mo-Bar Hydraulic Sales Company; that during the years 1957 and 1958 the same persons constituted the stockholders and board of directors of both companies and that the same individuals held identical offices in both corporations; that he as president did business for both corporations out of the office at Crystal Lake, Illinois; that Mo-Bar Hydraulics, Inc. had no employees in Crystal Lake other than himself; that he acted as agent of that company and transacted business for that company from his office in Crystal Lake which had a sign thereon designating the office as that of Mo-Bar Hydraulic Sales Company. Mr. Modrich also testified that separate books were kept for Mo-Bar Hydraulics Inc. and for Mo-Bar Hydraulic Sales Company.

On May 2, 1958 Mr. Modrich, as president of the Sales Company wrote plaintiff at its division office in Chicago inquiring whether plaintiff would exchange a quantity of 3/4" tubing for 5/8" tubing. Again on May 5, 1958 Mr. Modrich, designating himself as president of the Sales Company, wrote the plaintiff about making this exchange and expressing the hope that something could be worked out in connection therewith. Ten months later Mr. Stainic, whom Mr. Modrich testified was controller of both companies, wrote plaintiff as follows:

1. The first part of the document is a list of references, which includes the following items:

*[Faint, illegible text]*

... ..

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.

[illegible][illegible]

the plaintiff went against this company and expressing the hope that  
somebody would be worked out in connection with this. For some time later  
the plaintiff was working for the defendant as a member of both companies,  
and the plaintiff was following

"Lindereme Tube Co.  
"1500 East 219th Street  
"Cleveland 17, Ohio

"Gentlemen:

"It seems rather foolish that grown business people would waste as much time as our respective companies have wasted in bickering over an amount of money which is certainly not a significant amount for either company. On the surface it appears to be nothing more than stubbornness on the part of both parties, namely E.M. Lindereme and J.L. Modrich. Of the two arguments involved, I believe the demand of Mo-Bar Hydraulics is the most reasonable. We have a quantity of material, manufactured by Lindereme, which was bought and paid for and is at the present time located on the dock of a local motor carrier. It so happens that this material is of a size which we cannot use and for which there are no immediate prospects for future use. All we are asking for is credit for this material to apply against the \$2,135.04 which we owe your company. You refuse to consider this on the premise that this tubing was of a special nature. According to Mr. Modrich, your Chicago representative sold this to us as a standard item, with the understanding that any excess quantities could be returned for full credit. To confirm this, I selected one supplier, at random, and found that they had 2000# of this size tubing in stock. If this is true, I see no reason why you refuse to accept the return of the shipment in question, inspect it and make us a concrete offer for it. This amount, if acceptable to us, would then be deducted from the amount due your company, and a check would go forward for the balance due. I am sure that you are as anxious as we are to bring this to a conclusion, and hope that you will grant us a concession in the matter. Yours very truly,

Mo-Bar Hydraulic Sales Co.  
By N.P. STAMIC, Controller."

There is no conflict in the evidence in this case. It discloses as counsel for appellant state that the tubing which is the subject matter of this suit, was ordered by Mo-Bar Hydraulics Inc. and was delivered by the plaintiff to a sub-contractor of that company. These facts, insist counsel are not sufficient to make the Sales Company liable in this proceeding notwithstanding the reference in the Controller's letter of March 2, 1959 wherein it was said: "All we are asking for is credit for this material to apply against the \$2135.04 which we owe to your company". Counsel argue that the statement of the writer of the letter to the effect that appellant Sales Company owed plaintiff \$2135.04 was the writers conclusion and was not a statement of a fact.





The record discloses that the material referred to in the letter and for which the Sales Company requested credit was other tubing which the Sales Company had purchased and either returned to the plaintiff or stored subject to the order of the plaintiff. It had nothing to do with the 29/64 inch tubing which plaintiff had shipped to the non-appealing defendant. This letter was written by the controller of the Sales Company who was also the controller of Mo-Bar Hydraulics, Inc. It was signed by the Sales Company and in unequivocal language admitted the indebtedness of the Sales Company to the plaintiff in the amount of \$2135.04.

In support of its contention that a recovery cannot be based on this admission, counsel for appellant cite *Hollist v. Bruse*, 69 Ill. App. 48. In that case a witness for the plaintiff was permitted to testify that defendants were indebted to the plaintiff in the sum of \$146.00 for lumber sold by the plaintiff and delivered for use upon the building of the defendants. The Appellate Court held that such a statement was a conclusion of the witness and not supported by any narrative facts. The question of the admissibility of admissions by a party to the litigation was not involved in the *Hollist* case.

In the instant case the one count complaint alleged that in February, 1958, the plaintiff, at the request of the defendants, sold and delivered to the defendants a certain quantity of aluminum tubing; that defendants promised to pay plaintiff therefor, on demand, the sum of \$2135.04; that altho the plaintiff had demanded payment, defendants had refused and plaintiff, therefore, demanded judgment against both defendants for that amount. The non-appealing defendant filed an answer admitting the "substance of the allegations of the complaint." The appealing defendant denied the allegations of the complaint. The issue, so far as appellant is concerned, was whether or not it was liable to the plaintiff for the sum of \$2135.04 which plaintiff



The record discloses that the material referred to in the letter

and the fact that the Company requested certain other things which the

Company requested and which were not the plaintiff or others

were not the plaintiff. It was found to be with the plaintiff that

nothing which plaintiff had asked for the Company's attention. This

letter was written by the controller of the said company who was also the

controller of the said company, Inc. It was signed by the said company

and the plaintiff's attorney admitted the authenticity of the said company to

the plaintiff in the amount of \$10,000.

In support of its contention that a recovery should be based on

this statement, counsel for plaintiff also offered, in the year 1934, in

that case a witness for the plaintiff was called to testify that defendant

were indebted to the plaintiff in the sum of \$10,000 for money paid by the

plaintiff and defendant for use upon the building of the defendant. The

plaintiff's Court held that such a statement was a confession of the truth and

not subject to any narrative facts. The question of the admissibility

of evidence by a party to the litigation was not involved in the latter case.

In the instant case the one court complaint alleged that in

February, 1934, the plaintiff, at the request of the defendant, sold and

delivered to the defendant a certain quantity of aluminum tubing that

defendant promised to pay plaintiff therefor, in cash, the sum of \$10,000;

that when the plaintiff had demanded payment, defendant had refused and

plaintiff therefore, demanded judgment against both defendant for the amount.

The non-suiting defendant filed an answer admitting the "existence of the

allegation of the complaint." The question of the admissibility of the

of the complaint. The issue, so far as plaintiff is concerned, was whether

or not it was liable to the plaintiff for the sum of \$10,000 which plaintiff

demand. The record clearly indicates a course of dealing between the plaintiff and appellant during the year 1958. The record also discloses that the names of both defendants are similar; that the officers of both defendants are identical; that the stockholders are identical; that the board of directors are identical and also that the same attorneys represented the defendants in the trial court and represent them in this court.

In *Anderson v. Pan American Motors Corporation*, 232 Ill. App. 27 it is said (p. 34) that whenever a party to a suit desires to prove the existence of any fact material to the issue in the case it is not necessary to introduce the evidence of persons who know the existence of such fact, but such fact may be proven just as conclusively by the admission of the opposite party or by his agents authorized to make such admission.

In *Casey v. Burns*, 7 Ill. App. 2d, 316, admissions and the effect and weight to be given to them are discussed. There the Court said, omitting citations (pp. 323, 324) "Ordinarily any admissions against interest of a party to the suit relative to the subject matter of the suit, tending to prove or disprove any material fact, are competent and admissible as original, substantive evidence against that party when inconsistent with the claim or defense he asserts in the suit. The law holds everyone responsible for what he says to the extent that his <sup>sayings</sup> / may be used as evidence against him of the truth of what he has said. And, by the greater weight of authority, an admission by a party constitutes competent, admissible evidence notwithstanding the party may have had no personal knowledge of the subject matter, but the lack of knowledge affects the weight of such evidence: ordinarily such admissions against interest by a party when made outside of Court are not conclusive on the party against whom they are offered and they may be explained, rebutted, or contradicted by other proper evidence; such admissions are to be considered and weighed by the trier of the facts like other evidence,

defendant. The record clearly indicates a course of dealing between the plaintiff and defendant during the year 1931. The record also discloses that the names of both defendants are identical; that the officers of both defendants are identical; that the stockholders are identical; that the names of directors are identical; and also that the same attorneys represented the defendants in the trial court and presented them in this court.

In *Johnson v. The American National Bank*, 22 Ill. App.

72 it is said (p. 74) that whenever a party to a suit desires to prove the existence of any fact material to the issue in the case it is not necessary to introduce the evidence of persons who know the existence of such fact, but each fact may be proved just as conclusively by the admission of the opposite party or by its agents introduced to make such admission.

In *Case v. Brown*, 7 Ill. App. 2d, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

and will be given to them as discussed. There the Court said, writing

opinion (p. 323): "Ordinarily any admissions against interest of a

party to the suit relative to the subject matter of the suit, tending to

prove or disprove any material fact, are competent and admissible as

original, substantive evidence against that party when inconsistent with the

claim or defense asserted in the suit. The law holds every person responsible

for what he says in the trial court. It may be used as evidence against

him of the truth of what he has said. And, by the greater weight of authority,

an admission by a party constitutes evidence, admissible, against a party making

the party may have had no personal knowledge of the subject matter, but the

fact of knowledge affects the weight of such evidence. Ordinarily such

admissions against interest by a party when made under oath and in a

proceeding on the part against which they are offered and they may be

admitted, rebutted, or contradicted by other proper evidence; such admissions

are to be considered and weighed by the trier of the facts like other evidence,



in the light of all the evidence in the case, and if voluntarily made and properly proved they may dispense with the necessity of further proof of the fact admitted. It is always competent, as substantive evidence, to prove a voluntary admission of the opposite party in interest to his prejudice, where it relates to matter material to an issue being tried, and such is not objectionable as hearsay."

Scovill Manufacturing Company vs. Cassidy 275 Ill. 462 was an action brought by the Scovill Manufacturing Company to recover from defendants on a certain instrument of guaranty executed by the defendants. By the provisions of the instrument the defendants, Ray Fulton and Jacob Alter, guaranteed payment of all moneys which would become due the Scovill Manufacturing company by reason of its manufacture and delivery of articles to the Canchester Incandescent Kerosene Light and Heat Company. It appeared that D.J. Canchester was president and general manager of the Light and Heat Company and upon the trial of the case Henry W. Adams, manager of Scovill Manufacutring Company's Chicago Office and one Roblin, an attorney for the Scovill Company testified to a conversation which they had had with said D.J. Canchester in connection with the account of the Light and Heat Company. Their testimony was that D.J. Canchester stated to them that there was due the Scovill Company from the Light and Heat Company, at the time of the conversation, the sum of \$13,670.13. In its opinion affirming the judgment of the Appellate Court which affirmed the judgment of the Municipal Court of Chicago in favor of the plaintiff, the Supreme Court said: (p. 469), "It is strenuously argued by counsel for plaintiffs in error that Adam<sup>5</sup>' and Roblin's testimony concerning Canchester's admissions as to what was due defendant in error from the Canchester Company was improperly admitted in evidence over their objections. There can be no question, under the authorities,

In the light of all the evidence in the case, and if voluntarily made and properly proved they may dispense with the necessity of further proof of the fact admitted. It is also competent, as substantive evidence, to prove a voluntary admission of the precise fact in interest to the parties, where it relates to matter material to an issue being tried, and such is not objectionable as hearsay.

It will be sufficient to say that, January 25, 1893, was an

active day in the Lowell Manufacturing Company in respect to the defendants on a certain instrument of writing executed by the defendants. In the provisions of the instrument the defendants, by John and John A. Carter, president of the company which would have been the Lowell Manufacturing Company by reason of its reorganization and delivery of articles to the Cambridge Manufacturing Company, light and heat company. It appeared that D. J. Cammester was resident and general manager of the light and heat company and upon the trial of the case Henry H. Adams, manager of Lowell Manufacturing Company's Office in Lowell and one William, an attorney for the Lowell Company testified to a conversation which they had had with said D. J. Cammester in connection with the account of the light and heat company. Their testimony was that D. J. Cammester stated to them that there was no conversation between the Lowell Company and the light and heat company, at the time of the conversation, the sum of \$100,000. In his opinion affirming the judgment of the Appellate Court which affirmed the judgment of the Municipal Court of Boston in favor of the plaintiff, the Appellate Court said (7-89), "It is extremely unusual for counsel for plaintiffs in such a case to be the plaintiff's exclusive counsel, and it is extremely unusual for counsel for defendants to be the defendant's exclusive counsel. In such a case the defendant in error from the Cambridge Company was improperly admitted in evidence with their objection. There can be no question, under the authorities,



Canchester being the president and general manager in charge of the business of the Canchester Company, that his admissions would be competent against the Canchester Company itself as to the amount owned by that company to defendant in error, as those admissions were made in the execution of the duties imposed upon him as general manager and concerning matters which were within the scope of his authority".

In the instant case, the controller of appellant, the Sales Company, wrote the letter of March 2, 1959 to appellee. In this letter appellant stated, "We owe your company \$2135.04". Again, toward the close of the letter, appellant, after requesting appellee to accept certain tubing which it had purchased and which it was desirous of returning to appellee requested appellee to inspect the tubing and make appellant an offer, the amount of which offer, if acceptable to appellant would then be deducted from the "amount due your company", which the letter stated was \$2135.04, the amount of this judgment. Certainly these statements were admissions that appellant was indebted to the plaintiff. No explanation was offered on behalf of appellant to explain the contents of the letter of March 2, 1959, or contradict the admissions therein contained or to question the authority of the controller to write the letter or make the admissions.

In addition to the letter of March 2, 1959 other letters were written by appellant to appellee and a check was also introduced into evidence all of which indicate a course of dealing between appellant and appellee throughout the year 1958. All the evidence tends to show that the sale of the aluminum tubing for which this action was brought was not a single isolated transaction. The trial court had before it not only the admission contained in the letter of March 2, 1959, but also this other evidence to which we have referred. The judgment entered/<sup>is</sup>wa<sup>r</sup>anted and sustained by the evidence found in this record and that judgment is therefore affirmed.

SMITH, P.J. CONCURS.

McNEAL, J. CONCURS.

Judgment affirmed.

Sanchez after being the president and general manager in charge of the  
business of the Sanchez Company, that his position would be constant  
against the Sanchez Company's bill as to the amount owed by that company  
to defendant in error, as those statements were made in the execution of  
his duties imposed upon him as general manager and controlling authority  
which were within the scope of his authority.

In the instant case, the corporation of appellant, the Sanchez Company,  
made the letter of March 2, 1939 to appellant. In this letter appellant stated  
to owe your company \$13,500.00. Appellant, having the duty of the office,  
appellant, after receiving appellant's letter, would certainly know what it had  
paid and what it was owing of appellant's company. Appellant  
apparently to inquire the letter and make appellant an offer, the terms of  
which offer, it is impossible to ascertain would have been identical from the  
"amount due your company," which the letter stated was \$13,500.00, the amount  
of this payment. Certainly these statements were identical with appellant  
and related to the plaintiff. The corporation was offered to settle  
appellant to make in the contents of the letter of March 2, 1939, or contradictory  
the plaintiff's letter and offer to question the authority of the corporation  
to make the letter or make the statements.

In addition to the letter of March 2, 1939 other letters were  
written by appellant to appellant and a check for the \$13,500.00 was  
all of which involved a series of dealing between appellant and appellant  
throughout the year 1939. All the evidence tends to show that the sale of  
the plaintiff's goods for which this action was brought was not a sale  
indicated transaction. The first point was before it was only the plaintiff  
contained in the letter of March 2, 1939, but also this other evidence to  
which we have referred. The judgment was affirmed and reversed by  
the evidence found in this case and that judgment is hereby affirmed.

WITNESSES:  
J. GONZALEZ,  
J. GONZALEZ.

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28 I.A.<sup>2d</sup> 138

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have been \$680.00.

The rules of the organization, under which she sought to recover, were formulated and adopted by the salesmen themselves. It was established that the 20% commission for securing an exclusive listing was one of the rules, but the undisputed testimony was that another rule provided that there would be no commission paid if a salesman or the broker purchased a piece of property himself, because in such a circumstance no broker's fee would be charged. Some salesmen related instances of the rule being applied when they bought buildings through the Schlick company. The Damen Avenue property was purchased by Schlick. He testified that there was no fee, and Mrs. Lovewell said she did not know if one was paid. She said she was told of the rules when she was first employed and that she received a copy of them, but that she never heard about there not being a salesman's commission if there were no broker's fee.

The plaintiff relied upon these rules and her theory of recovery was based upon them. She cannot use them when they are to her advantage and disclaim them when they are to her disadvantage. She failed to prove that she was entitled to a commission under the rules and regulations which governed the operation of the defendant's business.





In addition to this she failed to prove the sale price of the building, the amount of the fee the defendant received, or whether there was any fee received at all. Where, as here, the elements of damage are susceptible of proof in dollars and cents, direct and tangible proof must be offered. 25 C.J.S. Damages, sec. 162(2). Evidence was entirely lacking as to any definite figures upon which a judgment of \$680.00 could be based. The burden was upon the plaintiff to prove every element of her case and this she failed to do.

The judgment of the Municipal Court will be reversed.

Reversed.

Schwartz, P.J., and McCormick, J., concur.

Abstract only.



28#3

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SUPERIOR COURT

OF COOK COUNTY.

Defendant-Appellant.

28 LA 138<sup>2d</sup><sup>2</sup>

28 LA 138<sup>2d</sup><sup>2</sup>

28 LA 138<sup>2d</sup><sup>2</sup>

Four days after the dismissal Themar petitioned for a rehearing and three days later filed a petition in the trial court seeking a declaration that the money part of the divorce decree had been discharged. In the





alternative he asked that his petition be dismissed for want of equity so that he would have a final order from which he could "appeal to the Appellate Court of Illinois as soon as possible."

Mrs. Themar moved to dismiss upon the ground that the trial court had no jurisdiction at that time because the petition for rehearing was still pending and because the mandate of this court had not been issued.

The chancellor sustained the motion to dismiss. Themar, the same day, filed notice of this second appeal. His brief is devoted to the same argument made previously, that the money which was to be paid under the decree was a property settlement and not alimony, and that a property settlement is dischargeable in bankruptcy. He states:

"Thus, the issue raised squarely on this appeal by defendant's petition, plaintiff's motion to dismiss, and the lower Court's order is whether the defendant's discharge in bankruptcy releases and discharges him from that portion of the Decree requiring him to pay \$4,400.00 to the plaintiff."

Although he sought to make this the issue he has not succeeded in doing so. There was no adjudication of this issue, however desirable that might have been if it had been presented in a proper way at a proper time. The order, denying all the relief prayed for in his petition, denied as well his alternative proposal that his petition be dismissed for want of equity. The petition was dismissed, not upon its merits, but upon Mrs. Themar's motion that the court lacked authority to entertain



the petition. An appeal from that order can raise only the question of the correctness of the court's ruling as to its own want of authority.

Themar's petition for declaratory judgment brought before the trial court the identical issues he had raised in his first appeal. These issues, at his request, were being reconsidered by this court at the time his petition was filed in the trial court. Although this court reaffirmed its decision two days before the hearing in the trial court, our mandate was not issued until several days after the hearing. Upon an appeal being perfected, all further proceedings upon the merits of a case are stayed in the trial court and that court may not enter an order which would have the effect of interfering with the review of the prior judgment, decree or order. Lind v. Spannuth, 8 Ill. App. 2d 442, 131 N.E.2d 796, aff'd, 9 Ill. 2d 311, 137 N.E.2d 360. The fact that the petition was for a declaratory judgment made no difference. A party cannot have the same issue adjudicated in two courts at the same time. Fairbanks, Morse & Co. v. City of Freeport, 5 Ill. 2d 85, 125 N.E.2d 57; Hudson v. Mandabach, 22 Ill. App. 2d 296, 160 N.E.2d 715. ||

The chancellor correctly refrained from making a ruling upon the merits of the cause before the mandate of this court was filed in the Superior Court. His order will be affirmed.

Affirmed.

Schwartz, P.J., and McCormick, J., concur.

Abstract only.



WILLIAM OLSEN,

Plaintiff-Appellee,

V.

CIVIL SERVICE COMMISSION OF THE CITY  
OF CHICAGO, DOLORES L. SHEEHAN,  
JOHN J. AHEARN and ALBERT W.  
WILLIAMS, Commissioners of the  
Civil Service Commission of the  
City of Chicago, and DEPARTMENT OF  
POLICE OF THE CITY OF CHICAGO,

Defendants-Appellants.

APPEAL FROM CIRCUIT

COURT OF COOK

COUNTY.

28 I.A.<sup>2d</sup> 146

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This is a proceeding under the Administrative Review Act. The Circuit court, upon appeal from the Civil Service Commission in the matter of charges against William Olsen, a patrolman, held that the findings and decision of the commission were against the manifest weight of the evidence and reversed the same. The specific charges and specifications upon which plaintiff was tried were conduct unbecoming a police officer, in that, on November 14, 1958, he was guilty of the wilful maltreatment of one John Cloud, striking him about the head, causing various wounds, contusions and abrasions, and that he also, without cause or provocation, drew his pistol and pointed it at John Cloud, in violation of Rule 470 of the Rules and Regulations of the Chicago Police Department. Rule 470 reads as follows:

"Rule 470. Force -- Exercise Discretion: A Police Officer shall discharge his duties in a prudent and civil manner.... He shall draw





his revolver only in extraordinary cases such as in defense of his own or another's life when attacked with a deadly weapon, or in pursuit of an escaping criminal charged with a grave crime, as murder, arson, robbery or other felony."

These charges grew out of an altercation in a tavern. At the conclusion of the affray, John Cloud was arrested for carrying a concealed weapon, to-wit: a razor in a holder, and Olsen was charged with disorderly conduct. According to Cloud, the cause of the trouble was that Olsen accused him of being in Olsen's apartment with Olsen's girl. Cloud denied the accusation. According to Cloud, Olsen then showed Cloud his pistol and told him he would kill him if he caught him there again. Cloud left the tavern and returned after he thought Olsen was gone. However, Olsen and his girl were there when Cloud returned, and she confirmed Olsen's accusation. The argument was resumed. Olsen pulled his gun, grabbed Cloud around the throat, hit him on the head with the back of his hand, pulled him out of the tavern, held the gun against Cloud's stomach and then released him. Cloud returned to his car. Olsen came up to the car, still holding the gun in his hand. Presently, Police Lieutenant John Benson appeared, took charge of the situation, and the parties were booked for the offenses before stated. During the argument, Cloud said, he had no weapon and made no attempt to attack Olsen. He said he was not an escaping criminal charged with murder, arson, robbery or other felony. Cloud's wife, who was present at a considerable portion of the affray, supported the substance



of her husband's testimony, particularly that he had made no attack on Olsen; that Olsen held a gun against her husband, and that at no time did Olsen say her husband was under arrest.

Olsen denies the foregoing testimony of Cloud and his wife. He testified in substance that Cloud had been drinking and annoyed him by insisting on wanting to buy him a drink; that Cloud had his hand in his pocket and told Olsen if he drew his gun, he would be dead before he could get it out. Olsen says he then drew his gun and placed Cloud under arrest. Olsen put his hand in Cloud's pocket and pulled out a razor in a holder. Olsen testified he used only the "force necessary to take him to the station," as Cloud was resisting.

There is thus a conflict between Cloud's and Olsen's testimony. There is one key to the situation which no doubt revealed to the commission where the truth lay. Lt. Benson had responded to a call that he go to the seat of the trouble. He did, and questioned the parties. He testified that Cloud told the same story he related at the hearing, but that Olsen told a different story in substantial respects. He told the lieutenant that Cloud had threatened him and that he took a small razor blade from him. He also told the lieutenant that he took Cloud around the corner and let him go in a few seconds. This is a direct contradiction of his testimony that he used





only such "force as was necessary" to make an arrest. The owner of the tavern was the only other witness. He gave such confused and conflicting testimony that the commission no doubt concluded he was unworthy of belief.

Obviously, this was a case for the Civil Service Commission to determine where the truth lay. We find that the commission's decision is supported by the evidence, and we see no basis for the trial court's finding that it was against the manifest weight.

It is argued that the prosecution suppressed evidence and that under the decision in Mooney v. Holohan, 294 U.S. 103, this violated the due process clause of the Constitution of the United States. This constitutional objection was waived when an appeal was taken to this court. Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E. 2d 840. However, there appears to be no basis for the charge. The alleged suppression of evidence related to the objection by the assistant corporation counsel to evidence offered by Olsen that on November 18, 1958 the Municipal court of Chicago found John Cloud guilty of carrying a concealed weapon. The commission rightly concluded that this judgment was not binding upon it. Even assuming that Cloud was guilty of carrying a razor, to which reference was made in our statement of facts, that would not thereby disprove the charges against Olsen.

It also appears to be plaintiff's contention that the fact that Olsen was acquitted of the charge of disturbing



the peace estopped the commission from trying him on the charges filed by the Commissioner of Police. Here, plaintiff appears to argue that this constituted a prior adjudication of the charges. The issues were not the same; the parties were not the same; and, indeed, proceedings such as those before the commission are of an entirely different character from those involved in prosecutions for criminal or quasi-criminal offenses.

It has been held repeatedly that in appeals under the Administrative Review Act, the reviewing court is to consider the record for the purpose of determining whether the findings and orders of the administrative agency were against the manifest weight of the evidence. It has no authority to try the case anew or to substitute its judgment for that of the commission. Crepps v. The Industrial Commission, 402 Ill. 606, 85 N.E.2d 5; Adamek v. Civil Service Commission, 17 Ill. App. 2d 11, 149 N.E.2d 466; Arboit v. Gateway Transportation Co., 15 Ill. App. 2d 500, 146 N.E.2d 582; Nolting v. Civil Service Commission, 7 Ill. App. 2d 147, 129 N.E.2d 236. By manifest weight is meant the clearly evident, plain and indisputable weight. Sayles v. Board of Fire & Police Comm'rs, 25 Ill. App. 2d 262, 166 N.E.2d 469.

Courts must be especially cautious in cases of this kind for the compelling reason that the discipline of a large body of armed men is involved. In Nolting v. Civil Service



Commission, supra, we had occasion to consider that phase of the matter, and said (page 161):

"Punitive discipline in the Police Department of the City of Chicago is initiated by the Commissioner of Police. He files charges with the Civil Service Commission only after he has reached the conclusion that the offender should be discharged from the force. Thus at the outset these proceedings involve the exercise of judgment by an expert. In fact, we must assume that the head of the Police Department of the second largest city in the country is a leading expert in police matters. Not only is he in position to exercise a superior judgment with respect to the particular individual involved but he can judge the effect of the disciplinary action taken on the morale of his entire force. What happens to discipline when a judge substitutes his judgment for the judgment of this expert and restores to office and to a position under the Chief of Police one whom the Chief has deemed unfit for that purpose? The result is described in a book entitled "Police Administration" by O.W. Wilson, a leading authority on the subject, as follows (p. 361):

"'From that time on [the chief of police] will have a subordinate who hates him, who is disloyal to him, and who will do everything in his power to put the chief in a disadvantageous position, regardless of the damage that may be done to the department and to the quality of the service.'"

It is our conclusion that the evidence in the instant case supports the finding of the Civil Service Commission.

Judgment reversed.

McCormick and Dempsey, JJ., concur.

Abstract only.





28 #3

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APPEAL FROM THE  
MUNICIPAL COURT  
OF CHICAGO.

28 I.A. <sup>2d</sup> 174

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED  
THE OPINION OF THE COURT.

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the fees, for it was well known to the parties that Kaplan was insolvent. The trial court rendered judgment for defendant on the pleadings and dismissed the suit. In rendering judgment on the pleadings, the court cannot decide issues of fact. A party moving for judgment on the pleadings admits the truth of all well pleaded facts in the pleadings of the opposing party, together with all fair inferences to be drawn therefrom. He also admits for the purpose of the motion the untruth of his own allegations insofar as they have been controverted. Dryz v. Bol, 19 Ill. App. 2d 406, 153 N.E.2d 859.

The issues are narrowed to this one point - was the preparation of the note by plaintiff and its acceptance by him a release of defendant's liability for attorney's fees. The note reads as follows:

"January 23, 1956.

The undersigned hereby agree to pay Harry Becker, 111 W. Washington Street, Chicago, Illinois, the sum of \$2,000.00 at the rate of \$166.66 per month commencing March 1, 1956 for attorneys fees incurred by Nathan Dvorson in connection with the sale of his stock to Louis Kaplan and the arrangement completed to pay the debt of Kappy's Inc. to Nathan Dvorson as part of the consideration for said transactions.

/s/	Kappy's Inc.
	By Louis Kaplan
	President
/s/	Louis Kaplan."

There is nothing in the note itself which constitutes a release of defendant, nor can such a release be inferred





from the mere fact that plaintiff himself prepared and accepted the note. It is not an uncommon transaction for one man to agree to pay a debt for another, without that other being released from his obligation to the creditor.

Defendant argues that plaintiff is estopped from claiming fees because the consideration defendant received for the stock was reduced by the amount of the note given for attorney's fees. This is denied by plaintiff. He avers that it was after the price of the stock had been agreed upon that Kaplan said he felt a moral obligation to pay the attorney's fees, and plaintiff then prepared and took the note without any intention of releasing defendant. Thus, another issue to be determined on the trial of the case is presented.

It is argued by defendant that a novation was created by plaintiff's acceptance of the note. The essentials of a novation are set forth in Printing Mach. Maintenance, Inc. v. Carton Products, 15 Ill. App. 2d 543, 147 N.E.2d 443. These are, first, a previous valid obligation; second, a valid agreement of all the parties to a new contract; third, the extinguishment of the old contract; and, fourth, the validity of the new contract. It is not admitted by plaintiff nor inferable from admitted facts that plaintiff agreed to the extinguishment of the original obligation of defendant, and hence one of the vital elements of novation is lacking. In Credit



Bureaus Adjustment Dep't v. Cox Bros., 207 Ore. 253, 295 P.2d 1107, it was held that the acceptance by creditors of notes of various individuals who owed money to debtors was not of itself evidence of an agreement to discharge the debtors of their obligations. The court said that an essential element of novation is that there must be a release of all claim of liability against the original debtor, since it is possible for a creditor to accept a new debtor as an additional debtor, still holding the original debtor liable, citing Vawter v. Rogue Valley Canning Co., 124 Ore. 94, 99, 257 Pac. 23, 262 Pac. 851. "The controlling element is the intention of the parties, and, unless there is a clear and definite intention on the part of all concerned to extinguish the old obligation by substituting the new one therefor, a novation is not effected." 207 Ore. at 258, 295 P.2d at 1109.

The judgment is reversed and the cause is remanded, with directions to the trial court to deny the motion for judgment on the pleadings, to hear the cause on the issues made, and for such other and further proceedings as are consistent with the views herein expressed.

Judgment reversed and cause  
remanded with directions.

McCormick and Dempsey, JJ., concur.

Abstract only.



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PROBATE COURT OF

COOK COUNTY.

V. e.

28 I.A.<sup>2d</sup> 200

Respondent-Appellee.

On August 28, 1958, using \$6501.15 of her own funds, decedent opened a joint savings account in the Austin Federal Savings and Loan Association in her name and that of respondent. Thereafter, decedent made two deposits in and six withdrawals from





the joint account. Respondent never made any deposits or withdrawals, and it is conceded that all the funds in the account at any time came from decedent. Respondent had the passbook when decedent died, but she had kept it continuously except for a five-month trip to Florida and two hospital visits.

In August, 1958, decedent secured respondent's signature for entry to her safety deposit box and gave him a key. About a week before her death, at her direction, he removed the box contents, which are now a part of the estate. This was the only time he entered the box, and it never contained any property of his.

In addition to the joint account, decedent had an individual savings account in the Oak Park Federal Savings and Loan. In November, 1958, decedent requested respondent's signature to a power of attorney, authorizing him to make withdrawals from this account. At that time she said to him, "You will notice that this is different than the other card," and he said, "This is a power of attorney. \* \* \* Why don't you make the other one the same way?" She replied, "No, I will leave it that way," and the respondent signed the card. At decedent's direction, respondent made two withdrawals from this account and used the money to pay her hospital bills.

There is no controversy over the Oak Park savings account or the contents of the safety deposit box. The sole question is whether the Probate Court was correct in finding that respondent,

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as the surviving joint tenant, is the owner of the funds in the Austin joint account at decedent's death.

The executrix concedes that the deposit agreement tends to show a donative intent on the part of decedent, the original owner of the funds, but contends there is contrary evidence in the record which rebuts this presumption and which clearly shows that no gift was intended, and that the account was for the convenience of decedent. The contrary evidence relied on is decedent's possession of the bankbook; all deposits were funds of decedent; and that respondent made no deposits or withdrawals, and made no claim or use of the account for himself during decedent's lifetime.

The form of the joint account agreement is not conclusive as to the intention of the depositors as between themselves, and "the facts and circumstances surrounding the transaction, and the happenings pertaining to such transaction thereafter," may be inquired into for the purpose of aiding the court in ascertaining the intention of the parties. (In re Schneider's Estate, 6 Ill. 2d 180, 187 (1955).) The presumption of donative intent, which exists by virtue of the joint deposit agreement, must be rebutted by convincing evidence showing the absence of the donative intent at the time of the execution of the joint agreement. In re Estate of Sneider, 12 Ill. App. 2d 485 (1957); In re Estate of Fitterer, 27 Ill. App. 2d 264 (1960).





Possession of the bankbook by either joint owner is for the benefit of both and is not inconsistent with the joint account agreement (Illinois Trust and Savings Bank v. Van Vlack, 310 Ill. 185, 191 (1923)), and we are not persuaded that possession was material here. Ownership of the funds and use of the account are proper areas for inquiry, but again we fail to see the instant evidence on these points has any determinative or convincing value. The presumption of donative intent must, of necessity, operate on funds of decedent rather than on respondent's own funds. Failure by respondent to use the account for his own benefit, unless it was based on something said or done by decedent, does not show an absence of original donative intent.

The evidence indicates that decedent was aware that the power of attorney was not the same as the joint savings agreement, and when respondent suggested the use of a power of attorney for the joint account, decedent replied, "No, I will leave it that way." Her subsequent conduct in maintaining in the joint account the approximate amount of the original deposit, and directing respondent to make withdrawals from the Oak Park account, is consistent with an original donative intent and does not rebut that presumption but fortifies it. Her statements and conduct as to the Oak Park account indicate that this account was intended for the convenience of decedent and not the joint account.



We believe the trial court was correct in concluding that the evidence relied on by the executrix was not sufficient to show the absence of a donative intent on the part of the original owner of the funds. For the reasons given, we believe the record supports the finding of the trial court in favor of respondent, and the order is hereby affirmed.

AFFIRMED.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.



23 #3

47920

YOLANDE P. LASSWELL,

Plaintiff-Appellee,

vs.

ROY S. LASSWELL,

Defendant-Appellant.

APPEAL FROM THE  
SUPERIOR COURT OF  
COOK COUNTY

23 I.A.<sup>2d</sup> 201

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This appeal arises from a modification of a divorce decree changing the custody of a six year old boy.

Yolande P. Lasswell, plaintiff, was granted a decree of divorce on April 30th, 1957, on the grounds of desertion. The decree, which was approved by the parties, provided for a property settlement, and the custody of the child, who was then four, was given to Roy S. Lasswell, defendant.

Plaintiff's first petition to modify the decree by granting plaintiff custody was ultimately heard on the ground that the defendant did not provide their minor child with a proper home. This petition was denied on July 1, 1958. Subsequently, on May 20, 1959, plaintiff filed a second petition seeking custody and to enjoin defendant from taking the boy on a dangerous raft trip down the Mississippi. Plaintiff alleges further that defendant was planning to move to another state with the boy; that defendant was addicted to abusive language and had displayed an arrogant disregard for the rights of others; and that defendant had disregarded the child's welfare by taking him from the plaintiff's home when the child was ill with a high temperature. The defendant then moved to strike and dismiss the petition because it did not specifically charge that new circumstances had arisen since plaintiff's first petition. This motion was denied and the matter proceeded to trial and evidence was taken.





The chancellor's written decision, changing custody from the father to the mother, in substance, found: that defendant is lacking in the necessary fitness to have custody of the child; that he committed many serious acts of extreme violence against the mother in the child's presence, including an attempt to seriously injure her by running her down with his automobile; that he disregarded the welfare of the child by forcibly dragging the child from the mother's home while the child was ill and still running a fever; that, without the court's permission, "he sought to risk the child's life on a hazardous water journey to New Orleans, on a home-made raft, over the turbulent lake and rivers, to prevent which this court entered an injunctive order;" that there was evidence indicating the father's addiction to violence, rage and unrestrained emotional outbursts, making him dangerous and unreliable; and that defendant's behavior in the courtroom and his wilful disobedience to court orders showed his instability.

The defendant argues that the words "change of circumstances or conditions" appear neither in the petition nor in the modification of the decree. While it is generally true that a change of conditions must appear to alter a decree fixing the custody of the children of divorced parents, *Dunning v. Dunning*, 14 Ill. App. 2d 242, this is a requirement that a state of fact be shown and not that a given word formula be used. The words "change of circumstances" is a conclusion.

The trial court has a "large discretion" in passing on petitions affecting the custody of children of divorced parents and it is generally to the best interests of children of tender years to entrust the care and custody to the mother, if she is a fit and proper person. *Nye v. Nye*,



411 Ill. 408, Dunning v. Dunning, 14 Ill. App. 2d 242. The main question before us is whether the trial court abused this discretion. We believe that the facts brought out at the hearing adequately supported the trial court's decision. This is not a customary adversary proceeding dealing solely with the rights of plaintiff and defendant, but one in which the interests of the State and, particularly, the child, are dominant. The best interest of the child is regarded as the controlling force in directing its custody, and the courts will look to this, rather than to the whims and caprices of the parties. "The guiding star is and must be, at all times, the best interest of the child." Nye v. Nye, 411 Ill. 408.

Defendant contends that the decree fixing the custody of the child and the denial of the first petition were res judicata as to all the facts and circumstances relied on by the trial court in reaching its conclusions. The earlier petition is not res judicata to facts then existing, but unknown to the court. Harms v. Harms, 323 Ill. App. 154. There is no indication that the incident of April 4, 1958, when defendant took the sick child out into the cold and tried to run down the plaintiff with his automobile in the child's presence, as found by the trial court's written opinion, was brought to the court's attention in the first custody hearing. Nor does it appear that the defendant's taking the child with him for many midnight and early morning visits to a woman client, prior to the former hearing, was known to the plaintiff at that time. The trial court also found that defendant disregarded its order concerning visitation and took the child and fled the jurisdiction. The defendant did not testify in his own behalf and offered no evidence to refute the many charges. We cannot say that the trial





court, who observed the parties and witnesses in this case, abused its discretion in awarding custody of the child to the mother.

The defendant, in his brief, states that the point he relied upon most strongly for reversal is the order denying his petition for change of venue. The defendant filed a petition for a change of venue on January 3, 1956, before Judge Harry G. Hershenson, prior to the entry of the divorce decree, which was granted. The Illinois Statute provides: "Neither party shall have more than one change of venue." Ill. Rev. Stat. 1959, Ch. 146, §8. Judge John Sbarbaro properly denied the second request for a change of venue which was made upon the filing of the second petition for a change in custody. It is contended by defendant that such a supplementary proceeding is regarded as a separate and a new proceeding for purposes of change of venue statutes and granting the request is mandatory. In support of this argument defendant cites Jackson v. Jackson, 294 Ill. App. 508; Des Chatelets v. Des Chatelets, 292 Ill. App. 357, and McPike v. McPike, 10 Ill. App. 332.

In these cases the trial courts refused to grant a change of venue on the grounds that the supplemental proceeding was not a suit or proceeding within the meaning of the statute relating to changes of venue and came too late. However, in none of these cases was there an earlier change of venue requested in the original proceedings, and the reviewing courts merely held these proceedings to be within the statute. In the instant case the parties treated the supplemental proceedings as a continuing proceeding and not independent of the original proceedings.



When the first supplemental petition for a change of custody was before Judge Hershenson, the court there reassigned the case to another judge for the reason that the proceedings showed that defendant had previously requested and was granted a change of venue from him. In effect and for all purposes the defendant was again granted a change of venue in the supplemental proceedings. "One change of venue having been already granted, the court properly refused the second application." *American Car. Co. v. Hill*, 226 Ill. 227.

The defendant also argues about certain proceedings in the trial court involving attorney's fees and appeal expense, but these proceedings were subsequent to this appeal and are not before us now. See *Jackson v. Jackson*, 294 Ill. App. 508.

For the reasons stated above, the decision of the trial court is affirmed.

AFFIRMED.

KILEY, P. J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY



28 #3  
FILED

Abstract

1941

PAUL V. WUNDER  
Agenda 4

NO. 11419

Abstract only

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, FIRST DIVISION  
OCTOBER TERM, A.D. 1960

1st DIVISION

RICHARD S. McGINTY and YVONNE McGINTY,

Plaintiffs-Appellees,

vs.

DONALD L. McBRIDE, ILL. DARI-DELITE, INC.,  
a corporation,

Defendants-Appellants, and  
ABE LEVIN, HERMAN LEVIN, WILLIAM LEVIN and

HARRY L. BURGER, CO-PARTNERS, doing business  
as ROSS-SYSTEMS,  
Defendants.

Appeal from the  
Circuit Court,  
Carroll County.

21  
28 I.A. 209

McNEAL, J. --

At the instance of the plaintiffs, Richard S. McGinty and Yvonne McGinty, a Circuit Judge, while his court was in adjournment, granted a temporary injunction without notice and without bond against the defendants, Donald L. McBride, Ill. Dari-Delite, Inc., Abe Levin, Herman Levin, William Levin and Harry L. Burger, co-partners, doing business as Ross-Systems. The defendants, Donald L. McBride and Ill. Dari-Delite, Inc., filed a motion to dissolve the injunction on the grounds that it was issued without notice and without bond and that the complaint on its face shows want of equity to support an injunction. In the motion they also moved to strike the complaint and each count thereof. The chancellor denied defendants' motion, and this appeal followed.

In their complaint plaintiffs alleged that on June 2, 1958, the defendants doing business as Ross-Systems granted plaintiffs an exclusive franchise to sell Dari-Delite products at a drive-in located on a lot in Thomson, Illinois, for a term of ten years, and leased them certain equipment for use in preparing such products from a soft



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, FIRST DIVISION  
COURTESY TERM, A.D. 1935

1st DIVISION

RICHARD S. MCGINLEY and YVONNE MCGINLEY,

Plaintiffs-Appellants,

vs.

RONALD L. WEIRIDE, L.L. DART-DILLITE, INC.,

a corporation,

ABE LEVIN, BERNARD LEVIN, WILLIAM LEVIN and  
Defendants-Appellants, and

HARRY L. HODGES, CO-OWNERS, doing business

as ROSS-SYSTEMS,

Defendants.

Report from the

Second Circuit

Second Circuit

281A-208

ORDER, 1. --

At the instance of the plaintiffs, Richard S. McGinley and Yvonne McGinley, a writ of habeas corpus was in adjournment. The defendant, Ronald L. Weiride, L.L. Dart-Dillite, Inc., the defendant, William Levin and Harry L. Hodges, co-owners, doing business as Ross-Systems. The defendant, Ronald L. Weiride and L.L. Dart-Dillite, Inc., filed a motion to dissolve the injunction on the grounds that it was issued without notice and without bond and that the complaint on its face shows want of equity to support an injunction. In the motion they also moved to strike the complaint and such count thereof. The chancellor denied defendants' motion, and this appeal followed.

In their complaint plaintiffs alleged that on June 2, 1935, the defendant doing business as Ross-Systems granted plaintiffs an exclusive franchise to sell Dart-Dillite products at a drive-in located on a lot in Thomson, Illinois, for a term of ten years, and leased them certain equipment for use in preparing such products from a self

ice cream mix furnished and sold by agents designated by Ross-Systems; that defendant McBride had negotiated the lease and franchise agreement as an agent for Ross-Systems; that when McBride negotiated the agreement he held a ten-year lease on the same lot from its owners, Harry and Luella Diehl, and orally agreed with plaintiffs to lease the place to them for ten years at \$125.00 a month; and although plaintiffs took possession of the lot and paid all rents, McBride refused to execute a lease to plaintiffs, and on February 23, 1959, gave them a notice to quit; and that on May 15, 1959, he and his family-owned corporation, Ill. Dari-Delite, Inc., brought an unsuccessful action to evict plaintiffs from the drive-in location.

In count I plaintiffs demanded that McBride be ordered to execute a lease of the lot to them, and in count II they demanded judgment for \$100,000 against McBride and Ill. Dari-Delite, Inc. In count III plaintiffs prayed for judgment for \$100,000 against all defendants, and for a temporary injunction without notice and without bond restraining defendants from preventing or interfering with plaintiffs obtaining Dari-Delite mix from the suppliers thereof. Except for plaintiffs' affidavit verifying their complaint there was no accompanying affidavit. A copy of the franchise-lease agreement was attached to the complaint. The complaint was filed on February 16, 1960, and on the same day upon reading the complaint the Judge ordered the injunction to issue. The writ was served on appellants the next day, and on other defendants on February 24. Appellants moved to dissolve the injunction and to strike the complaint on March 17, 1960.

Section 3 of the Injunction Act (Ch. 69, Ill. Rev. Stat. 1959) reads as follows: "No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears from the complaint or affidavit accompanying the same that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice."

[illegible]



A temporary injunction without notice should be granted with great caution, and should never be issued unless it clearly appears from the facts stated that the case is within the statutory exception. *McHard v. Gibb Motors, Inc.*, 1 Ill. App. 2d 225; *Brown Music Co. v. City of Sullivan*, 350 Ill. App. 400; *City of Edwardsville v. Illinois Terminal R. Co.*, 350 Ill. App. 63.

In *Skarpinski v. Veterans of Foreign Wars*, 343 Ill. App. 271, 274, the Appellate Court, First District, said:

"Even when granted upon a full and final hearing, injunctions are considered extraordinary remedies. They are more than extraordinary when granted after notice for a temporary period without issue having been joined and a hearing had. How extraordinary then must be the circumstances under which they should be granted without notice to the opposing party. In the most primitive concepts of justice, one of the fundamental requisites for the exercise of judicial authority over the person or property of another is notice. The exceptions to this rule are rare indeed. They embrace cases where by a stroke of the pen, a movement of the hand, or a tour de force executed over night the defendant intends to and can destroy the substance of the litigation and thus defeat the power of the court to do justice. Caution and circumspection must be the watchwords to guide the court's action and any doubts as to its wisdom must be resolved against the action. Only where these standards are meticulously observed will such orders survive review, for when an injunction is issued without notice in a case where notice should have been given, this court will reverse the order upon that ground without regard to any other question. This has been the law as laid down in decisions of this court for more than half a century."

Plaintiffs' allegations in support of their application for a temporary injunction without notice must be tested in the light of the foregoing authorities and statutory prohibition. In their complaint filed on February 16, 1960, plaintiffs also alleged that they intended and were preparing to open their Dari-Delite Drive-In business for the 1960 season on or about April 15; that defendants





had cut off plaintiffs' supply of Dari-Delite mix and thereby had prevented them from operating their business from April 20 until September 29, 1959; and that defendants were threatening to cut off plaintiffs' supply of mix for the 1960 season and for the remainder of the 10-year term of the franchise and lease agreement.

Plaintiffs argue that it wouldn't have taken the defendants two months, or untill April 15, to accomplish their threats to cut off plaintiffs' supply of mix. This, they say, could have been accomplished in the few minutes it would have taken to telephone the suppliers or to write them a letter not to furnish any more mix to plaintiffs. To be effective this argument must be predicated upon an assumption that defendants had control over the suppliers and that such control once exercised, was irrevocable. Yet, if any inference is to be derived from the fact that defendants cut off plaintiffs' supply of mix during the 1959 season, it must be that defendants had enough control over the suppliers so that the supply of mix was turned on sometime after September 29; otherwise there was no cut-off of mix to be enjoined. Obviously, if defendants had control over the suppliers, the supply of mix could have been turned on as well as cut off in the few minutes necessary to telephone or write a letter. Plaintiffs' suggestion that defendants could have telephoned their suppliers in a few minutes also suggests that plaintiffs could have telephoned defendants and given them previous notice of the application for a temporary injunction, and thereby produced an appearance by defendants or their attorney within a few minutes.

Plaintiffs' argument begs the real question presented here, i.e., whether they could have been unduly prejudiced by cutting off their supply of a product which by their own allegations they had no intention to use until two months after the issuance of the injunction. With two months intervening, a trial on the merits pertaining to the issuance of the injunction could probably have been had before

and out of Plaintiff's supply of Defendant's and Plaintiff's  
prevented them from operating their business from April 20 until  
October 10, 1957, and that defendant's were unwilling to get off  
Plaintiff's supply of mix for the 1958 season and for the remainder  
of the 10-year term of the franchise and lease agreement.  
Plaintiff agrees that it would not have taken the defendant's  
two months, or until April 15, to reestablish their business to the  
off Plaintiff's supply of mix. This, they say, could have been  
accomplished in the few minutes it would have taken to telephone the  
supplier or to write them a letter not to furnish any more mix to  
Plaintiff. To be effective this argument must be predicated upon the  
assumption that defendant had control over the supplier and that  
such control once exercised, was irrevocable. Yet, if any influence  
is to be derived from the fact that defendant was off Plaintiff's  
supply of mix during the 1958 season, it must be that defendant had  
control over the supplier so that the supply of mix was  
turned on sometime after September 20; otherwise there was no cut-off  
of mix to be enjoined. Obviously, if defendant had control over  
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Plaintiff's argument that the real question presented here,  
i.e., whether they could have been made prohibited by cutting off  
their supply of a product which by their own admissions they had no  
intention to use until two months after the issuance of the injunction,  
also two months intervening, is vital to the merits pertaining to the  
 issuance of the injunction could probably have been had before

plaintiffs had any occasion to use the mix in question. Further, the supply of mix was last cut off in September, 1959,--about five months before issuance of the writ. So far as appears, a cut-off of plaintiffs' supply was no more probable in February, 1960, than it was at any time after September, 1959. Although plaintiffs allege that defendants threatened to cut off the supply of mix, no facts as to the time or manner of such threats appear. There is nothing in this record to show how the situation was any different on February 16, 1960, than it was at any time after September 29, 1959, or why it would not have been practical to give defendants notice of this application any time between those dates.

Plaintiffs' further allegation that "their rights will be unduly prejudiced and lost" if they were required to give notice of their application for an injunction was a mere conclusion and afforded no justification for failure to give notice. *Stenzel v. Yates*, 342 Ill. App. 435, 441. The facts alleged here show no such urgency as is required to bring plaintiffs within the exception to the statutory prohibition against granting an injunction without notice.

Plaintiffs also contend that defendants waived any complaint concerning issuance of the injunction without notice because they combined their motion to dissolve the injunction with a motion to strike the complaint; and that the court's order denying the combined motion to dissolve and to strike was a judicial determination binding on defendants and this court, that the complaint stated good cause for issuance of the writ without notice. Defendants' alternative motion to strike was based upon other grounds than those specified for dissolution of the injunction. There is nothing in the record indicating that the trial court in denying the <sup>alternative</sup> motion considered or held that the complaint was sufficient for issuance of the injunction without notice. Further, this court following the rule set forth in *Stenzel v. Yates*, 342 Ill. App. 435, 442, has held that lack of compliance with the statute on notice may be urged on motion to



plaintiffs had any occasion to use the milk in question. Further,  
the supply of milk was taken out of the refrigerator, 1950, when the  
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the supply of milk was taken out of the refrigerator, 1950, when  
it was to any other effect. Further, 1950. Although plaintiffs allege  
that defendants threatened to cut off the supply of milk, in fact,  
to the time of removal of the milk from the refrigerator, 1950, it was  
this record is to show the situation was not different in January 1950,  
1950, when it was at any time after September 22, 1950, or any time  
not have been provided to give defendants notice of this application  
any time before September 22, 1950.

Plaintiffs further alleged that defendants refused to  
supply milk to them and that it was not intended to give notice of  
their application for an injunction to any other person or entity.  
In addition, the milk was taken out of the refrigerator, 1950, when  
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dissolve the injunction, alone or in connection with other grounds, and that irregularities in the issuance of an injunction without notice are not waived where the motion to dissolve also challenged the complaint for want of equity. McHard v. Gibb Motors, Inc., 1 Ill. App.<sup>2d</sup> 225.

This injunction was improperly issued without notice, and the trial court should have allowed defendants' motion to dissolve. The order of the Circuit Court of Carroll County is reversed, and the cause remanded with directions to allow the motion and to dissolve the injunction.

Reversed and remanded.

Smith, P. J., and Dove, J. Concur.



1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

and that the results of the study are in line with the findings of other studies.

transferred to the envelope of notes and envelopes and not sent

the applicant for the purpose of obtaining a license to practice law in the State of New York.

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Smith, P. J., and Dove, J. Concur.

48006

STATE LOAN ASSOCIATION OF ILLINOIS,  
INC., a Delaware Corporation,

Plaintiff-Appellee,

v.

CHARLIE L WRIGHT,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

28 I.A.<sup>2d</sup> 224

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order granting the plaintiff's motion for a summary judgment on an allegation of fraud and denying the defendant's motion for summary judgment.

The Loan Association's complaint is that the defendant made oral and written statements and representations to it which were false, fraudulent and deceitful and were intentionally, wilfully and maliciously made by him for the purpose of deceiving it and inducing it to make a loan of \$135.00 and that in reliance thereon, the loan was granted. It further asserts that the Loan Association was damaged as the result of the defendant Charlie Wright's filing of a voluntary petition in bankruptcy.

It is agreed that if the defendant is liable for obtaining the loan by false representations, this liability would not be discharged in bankruptcy. The Bankruptcy Act specifically provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except...liabilities for obtaining



money or property by false pretenses or false representations...".  
United States Code, Title 11, Chapter 3, section 35.

The printed loan application form contained the following credit inquiry: "The only person I owe money to and the amounts are as follows:". The defendant Charlie Wright scrawled: "I have no other loons (sic)".

In point of fact, the defendant was indebted to Western Tire Auto Store, Inc. for \$335.93, Norman Acceptance Company for \$65.70 for auto parts and repairs and Towne Clothiers, Inc. for \$200.00.

The Loan Association's motion for summary judgment incorporated the defendant's answers to the Interrogatories. In these Interrogatories, defendant Charlie Wright denied that he "executed" the loan application affidavit. He explained that he "merely wrote upon the document my name and such other words as I was told to write by the plaintiff, all without my knowing what the document meant, without my understanding it, all of which facts were well known to the plaintiff." He claimed to be an "illiterate and an uneducated person" who didn't know what he was doing. He said that he didn't know whether he signed any other wage assignments but supposed that he did. He also admitted that he probably signed other notes to secure his debts, however, he said that he didn't know the meaning of the word "note" and was not familiar with the meaning of business papers or legal documents.

In an action for fraud and deceit, it is incumbent upon a plaintiff to show representation, falsity, scienter, deception





and injury. It is the Loan Association's contention that in its motion for summary judgment, it proved that the defendant made material misrepresentations in the application for the loan, that they were untrue, that the defendant knew them to be untrue, that they were made to induce the plaintiff to loan the money and that the plaintiff relied upon these misrepresentations and was damaged thereby.

The plaintiff's argument in that the defendant Charlie Wright must have known about the existence of the other debts, the other notes and the other wage assignments. However, the defendant denied that he knew that these representations were false. He asserted that his statement that he had no other loans did not mean that he had no other debts. He said that he didn't realize that the application form contained anything about other wage assignments. He said that he didn't make any oral representations to the plaintiff.

It seems clear from the foregoing that there were genuine issues of fact, at least as to scienter, to be determined and that the summary judgment proceeding was inappropriate for such a determination. The law is clear that the plaintiff must prove all the necessary allegations of fraud and that presumptions will not be indulged.

The rule of law governing summary judgments was recently summarized in Schumacher v. Fatten, 18 Ill. App. (2d) 387, 390-1, where the court stated: "The purpose of such procedure is not to



try an issue of fact but to determine whether one exists between the parties. Affidavits for plaintiffs should be construed strictly, those for defendant liberally. Plaintiff's right to judgment should be free from doubt. If the defense is arguable, apparent, made in good faith, it should be submitted to a jury."

The next question to be considered is whether the trial court properly disposed of the defendant's motion for summary judgment. The defendant seeks a summary judgment on the basis of a clerical error in the statement of the loan. The printed form erroneously indicated that a chattel mortgage was taken as security, along with a note and a salary assignment. However, it is admitted that only the note and salary assignment were taken as security and that the words "chattel mortgage" in the form should have been crossed out.

The defendant argues that this inadvertent error in the statement renders the entire transaction void ab initio because it does not comply with the Small Loan Act. This statute requires that "Every licensee shall: Deliver to the borrower at the time the loan is made a statement...showing in clear and distinct terms the principal amount and date of the loan, the schedule of payments, the nature of the security, if any, for the loan, the name and address of the borrower and of the licensee, and the agreed rate of charge; ...". Ill. Rev. Stat., 1955, Chap. 74, sec. 32. The statute further provides that anyone violating any of the pro-



visions of this section "shall be guilty of a misdemeanor and punishable by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense; ...". "Any contract of loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a misdemeanor under this Section, shall be void and the lender shall have no right to collect or receive any principal, interest, or charges thereon whatsoever." Ill. Rev. Stat., 1955, Chap. 74, sec. 37.

The legislative purpose in enacting this legislation is apparent from the four corners of the act, namely: to regulate those engaged in making small loans to necessitous borrowers for the protection of the borrowers. *Sunderland v. Day*, 11 Ill. App. (2d) 248, 254., *affd.*, 12 Ill. (2d) 50.

If the loan company had taken any form of security without so indicating it in the statement to the borrower, the underlying transaction would be void. That would constitute a clear violation of the statute; it was one of the abuses which the statute was designed to correct. It is equally apparent that the provision relating to the listing of security does not apply if no security was in fact taken. The statute uses the expression, "the nature of the security, if any". In this case, the lender did take security. The loan was secured by a note and a wage assignment and this information appears in the statement. The difficulty arises in the fact that it also indicated that the loan was secured by a chattel mortgage.





This erroneous inclusion does not violate the terms of the act. It does not diminish the protection afforded to the borrower. As a practical matter, the lender has no additional advantage in listing a non-existent security. Its interest lie clearly in the scrupulous compliance with a statute that the ~~was~~ designed to protect its customers. The slight clerical oversight is not the type of deviation that warrants the avoiding of the transaction. The trial judge correctly denied the defendant's motion for summary judgment.

The order denying defendant's motion for summary judgment is affirmed. The summary judgment for plaintiff is reversed and the cause is remanded for action in accordance with this opinion

Affirmed in part and reversed in part and remanded with directions.

AFFIRMED IN PART AND REVERSED  
IN PART AND REMANDED WITH  
DIRECTIONS.

BURKE, P. J., and FRIEND, J., CONCUR.

for letter from  
Court 11-25-60  
HS



28#4

48078

GEORGE W. MILLIGAN,

Appellee,

v.

CALUMET FLEXICORE CORPORATION,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

28 I.A. 242<sup>2d</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover an unpaid balance of \$2777.21 alleged to be due for commissions earned by him as a salesman of defendant's building product known as Flexicore. Defendant in its answer denied liability and filed a counterclaim alleging that it was damaged by plaintiff in the amount of \$10,000.00 as the result of his having vountarily quit the employ of defendant while still owing it for overdrafts against commissions, for having worked for another firm while still in defendant's employ, and for having incurred expenses for which he was reimbursed by defendant while working for another, although still in defendant's employ. Plaintiff's answer to the counterclaim denied liability. The case was heard by the court without a jury and resulted in a finding and judgment for plaintiff on his statement of claim in the sum of \$2579.26 representing commissions due for materials sold by plaintiff, and costs, but the court overruled plaintiff's claim for interest on the judgment at five per cent for vexatious delay. Judgment was also entered against defendant on its counterclaim. Defendant appeals from both these judgments.





Defendant is engaged in the manufacture of prestressed concrete beams used in building construction. The product is sold to building owners, contractors, and architects who specify Flexicore for inclusion in building plans. Since the product is prefabricated, rather than cut and shaped on the job, it requires precision in initial specifications, manufacture, and installation. Plaintiff, a graduate civil engineer, was hired by defendant in September of 1954 to be its area sales representative in the State of Illinois outside the Chicago metropolitan area. The evidence is in conflict as to the exact duties required ~~to be performed~~ of plaintiff under the terms of the oral contract of employment. It is agreed, however, that the contract was of indefinite duration, that plaintiff was to receive a drawing account of \$125.00 per week against commissions earned at the rate of three per cent of net sales in his territory, the commissions to be credited only after payment had been received from the customer.

In October of 1956 defendant received notice that its patent licensor had taken away certain territory in southern Illinois and had granted a license for that and other territory to the St. Louis Flexicore Corporation whose founder was the former owner of defendant and the man who had originally hired plaintiff as defendant's employee. Defendant thereupon notified plaintiff that any business he was working on in that territory must be turned over to St. Louis Flexicore Corporation at once and that plaintiff was to cease working in that territory.



Meanwhile, plaintiff had conferred with the founder of St. Louis Flexicore about the possibility of investing in that company and selling for it, and worked on some jobs in the St. Louis Flexicore territory. He claims defendant knew of his activities, but defendant's evidence is to the contrary. Plaintiff was paid by St. Louis Flexicore for three jobs sold by him for that company while employed by defendant. He also worked on other jobs for St. Louis Flexicore while employed by defendant for which he was not paid because the jobs did not materialize. His association with St. Louis Flexicore was terminated February 8, 1957. Plaintiff voluntarily quit defendant's employ on two week's notice on February 19, 1958.

There are but two disputed questions in this controversy: the first is concerned with the nature and extent of plaintiff's duties; the second requires a determination as to when plaintiff's commissions were to be considered earned. As to the first issue, it is urged by defendant that in addition to calling on architects and others in an effort to have Flexicore specified in pending or future plans and procuring a contract or order for Flexicore from the successful bidder, plaintiff's duties included, inter alia, helping the architect in his design; making "take-offs" or quantity estimates; checking on appurtenances necessary to the installation of the product; relating it to the other phases of construction; maintaining co-ordination between the plant and contractors on deliveries; following up on the physical aspects of a job during construction; ascertaining that the installation was in accordance



with the specifications; following up and co-ordinating the completion of any operation; and after the job had been invoiced, assisting in the collection of delinquent accounts. In short, it is urged that a local contractor erecting a particular structure looked to plaintiff as much more than a salesman. Basing its argument on these considerations, defendant takes the position that when, under the contract of employment, the employee is required to perform duties in addition to procuring an order to entitle him to remuneration, such employee is not entitled to remuneration when he voluntarily quits his employment (even though he negotiated the sales for which commissions are claimed) without having performed the additional duties. For the greater part of one day the court heard evidence pro and con as to plaintiff's duties, and at the conclusion of the hearing found that "the basic duties of the plaintiff were sales and sales promotion and that other activities performed from time to time from the beginning of the employment . . ., such as trouble shooting, collections, et cetera, were incidental to the basic and fundamental job of selling, sales promotion and such duties were performed as a matter of good will, not only to the employer but to the customers of the employer obtained by the plaintiff in this case." We have carefully examined the evidence pertaining to this phase of the case, and while it is true that from time to time plaintiff performed activities other than sales work, usually in connection with sales made or those which he sought to consummate, they were not unusual to sales promotions in connection with building





operations and were nothing more than public relations activities that any good salesman would utilize in an effort to persuade builders, architects, and building owners to specify Flexicore in building plans. We are satisfied that the court's findings are fully supported by the evidence.

With respect to the second controverted issue--when plaintiff's commissions were to<sup>be</sup> considered earned (a corollary of the first issue)--it was agreed that plaintiff was entitled to receive credit for such commissions at the rate of three per cent of net sales only after payment had been received by defendant from the customer. The court found that plaintiff did in fact sell the five jobs in controversy for which he claims commissions, and that defendant billed and collected on those jobs after February 19, 1958, the date on which plaintiff's employment was terminated. There appears to be no dispute that plaintiff made the sales for which commissions are claimed, and if these five sales were billed and collected, we perceive no reason why plaintiff should not be entitled to commissions for negotiating the sales. As heretofore indicated, the court found, and we think properly so, that any work remaining after the sales were made, billed, and collected were no part of plaintiff's contractual duties, and there is no evidence of any additional cost to defendant in connection with the jobs resulting from the resignation of plaintiff; on the contrary, the court found that the evidence was clear that the usual procedure of defendant was to supply an installation true to form. The court also found that plaintiff was overdrawn against his commissions



as of February 19, 1958, the date of his resignation, in the amount of \$166.58, and allowed defendant credit therefor.

As to the counterclaim, the court rejected the theory of defendant as to damages suffered as a result of any activity participated in by plaintiff for the St. Louis Flexicore Company. It found that the St. Louis Flexicore jobs for which plaintiff was paid by that concern were an outgrowth of jobs originating with the Calumet company and transferred to the St. Louis concern when the sales boundaries were altered, and it further found that plaintiff gave little time to the jobs after they were assigned to the St. Louis concern; it accordingly ruled against defendant on its counterclaim.

For the reasons indicated, the judgment of the Municipal Court in favor of plaintiff on his claim and against defendant on its counterclaim is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J., and BRYANT, J., CONCUR.





WILLIAM F. HANSSEN,

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

20 I.A.<sup>2d</sup> 242<sup>2</sup>

William F. Hanssen and Irene Hanssen were married in Chicago on June 14, 1947. In 1951 he filed a complaint for divorce alleging cruelty. She filed an answer and counterclaim for separate maintenance, also alleging cruelty. The issues were found in favor of Mrs Hanssen. On May 20, 1954, his complaint was dismissed for want of equity and a decree for separate maintenance entered in her favor. The parties had no children. The decree did not mention property rights or support money. The decree was affirmed. 6 Ill. App. 2d, 368, (Abst.)

On February 1, 1956, William F. Hanssen filed a new complaint for divorce on the theory that his wife had deserted him on June 1, 1954, and had persisted in the desertion. Plaintiff alleged that prior to June 1, 1954, a decree of separate maintenance was entered in favor of his wife; that commencing with June 1, 1954, he had on numerous occasions requested her to return to live with him, but she steadfastly refused so to do. On April 20, 1956, the defendant answered that on or about March 3, 1951, her husband wilfully absented himself and deserted her without any fault on her part, and has persisted in such desertion: that a decree of



separate maintenance was entered in her favor on May 20, 1954; that she has pursuant to the decree lived separate and apart from the plaintiff, and that plaintiff has never requested her to return and live with him. The case came on to be heard on the regular trial call. On May 10, 1956, it was set for hearing on May 18, 1956, "without further notice."

Plaintiff, his mother and his aunt testified. The chancellor was informed that a decree for separate maintenance had been entered on May 20, 1954. On May 18, 1956, the court entered a decree dissolving the bonds of matrimony between the parties. The decree did not adjudicate property rights and did not deny or waive alimony, money or a property settlement in lieu of alimony. On July 26, 1956, the defendant petitioned that the divorce decree be vacated. The supporting affidavit by her attorney tells about negotiations with the attorney for the plaintiff looking to an agreement for a "cash settlement." At a meeting the defendant rejected a "further offer" from plaintiff. The attorney for defendant informed the attorney for plaintiff that he believed that the offer was fair and that it would be in his client's best interest for her to accept. The affidavit further recites that affiant told the attorney for plaintiff that he would discuss the matter with the defendant and thereafter relate to the attorney for the plaintiff the outcome of the discussion, that no further communication was had between affiant and the attorney for plaintiff, and that it was affiant's belief that negotiations had not been concluded "but were merely delayed while defendant reconsidered the offer."



The affidavit stated further that because of inadvertence of an employee in his office who was "required to check the calendar" affiant was not aware that the cause was to be called on May 18, 1960, and he did not appear in court on that date. He was "under the impression" that negotiations were pending and that plaintiff and his counsel "would not attempt" to proceed without notice to him. No notice was given to him by plaintiff's attorney. Affiant "since learned" that the cause was called on a contested cases calendar on May 10, 1956, and continued to May 18, 1956, without further notice, and says that between May 10 and May 18, 1956, plaintiff's attorney failed to notify affiant of the entry of that order. The affidavit states that an examination of the transcript in the instant case revealed that plaintiff and his witnesses testified to a desertion by the defendant on or about June 1, 1954; that the fact is that from May 20, 1954, defendant "has lived separate and apart" from the plaintiff pursuant to the terms of the decree for separate maintenance; that neither plaintiff nor his counsel advised the court of the prior decree; that their failure to do so constitutes a fraud on the court; and that the court would not have entered the decree for divorce if it had been aware "of the foregoing facts which the plaintiff and his counsel deliberately and wrongfully concealed."

Plaintiff, answering the petition, stated that at the last conference between the parties the defendant said she would not negotiate further, that she would not consider any





settlement, that the case would have to be tried, and that defendant "made it clear to everyone that negotiations were at an end." He denied that any decree was obtained while negotiations were pending and says that no notice was necessary. Plaintiff's accompanying affidavit by his attorney states that he was in accord with the attorney for the defendant that it was to the best interest of all concerned that the parties be divorced; that at the last conference attended by the parties and their attorneys defendant became abusive to affiant, to her husband and to her attorney; that she would not consider any settlement and that the case would have to be tried; and that it was "clearly understood by everybody that the case would have to go to trial." Plaintiff's attorney denies that there was any understanding or "intimation whatsoever" that the matter would be discussed any further. Affiant further stated that in view of defendant's "insulting attitude" he would not attend any more conferences "but would go ahead and place his case before a judge for decision." Affiant denied that a notice is necessary for a cause that is regularly reached on the trial call and concludes by denying that fraud was committed in procuring the decree, and asserts that the chancellor's attention was called to the fact that a decree for separate maintenance was entered on May 20, 1954. On December 16, 1959, the court entered an order finding that "it does not have jurisdiction to grant the prayer of defendant's motion to vacate" the decree and that defendant's motion be denied. She appeals.



The decree for divorce was not obtained under any misrepresentation. The complaint clearly stated that prior to the date of the alleged desertion a decree of separate maintenance was entered in favor of defendant. The answer admitted this allegation. The court is presumed to know the contents of the pleadings. During the interrogation of the plaintiff in the hearing of the divorce case he was asked whether a decree for separate maintenance was entered on May 20, 1954, and answered in the affirmative. There was no attempt to conceal from the chancellor the entry of the separate maintenance decree. The parties are in agreement that at their final meeting plaintiff's offer was rejected and that no further communication was had between them. Plaintiff does not say that he had an understanding that there would be further negotiations. The affidavit states by way of conclusion that it was affiant's "belief" that the negotiations had not been concluded, that he was "under the impression" that negotiations were pending, and that plaintiff and his attorney would not attempt to proceed without notice to him.

Defendant's attorney is in agreement with plaintiff and his attorney that the dissolution of the marriage is in the best interest of society and the parties. Defendant does not argue that the decree in the instant case should be reversed because of the insufficiency of the evidence. He urges that leading questions elicited testimony which plaintiff, his witnesses and counsel knew was false, and which, when combined



with plaintiff's failure to advise the chancellor that the separate maintenance decree had been entered for defendant, "increased the misrepresentation already practiced upon the court." Plaintiff calls attention to the following paragraph of Sec. 18 of the Divorce Act (Par. 19, Ch. 40, Ill. Rev. Stat. 1959) reading: "Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, it may at any time after the entry of a decree for divorce, upon obtaining jurisdiction of the person of the defendant by service of summons or proper notice, make such order for alimony and maintenance of the spouse and the care and support of the children as, from the evidence and nature of the case, shall be fit, reasonable and just, but no such order subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony or a money or property settlement in lieu of alimony, or where the court by its decree has denied alimony." Plaintiff states that in view of the fact that no mention is made of alimony in the decree, "if the defendant has a legitimate claim for alimony she may assert it" and that on the filing of a petition by her setting forth her claims and an answer by plaintiff, the chancellor may decree that defendant "have something" or that plaintiff "go hence without day."

In arguing for a reversal of the order the defendant cites *Ellman v. De Ruiter*, 412 Ill. 285, where the court sustained the vacation of default judgments because of unfair tactics





practiced on opposing counsel subsequent to the entry of the judgments. The record in the case at bar does not disclose that any unfair tactics were practiced by plaintiff's counsel before or subsequent to the entry of the decree for divorce. Defendant also calls our attention to the recent case of Jansma Transport Co. Inc., v. Torino Baking Co., No. 48025, filed November 2, 1960. In that case the court in affirming an order vacating judgments after the expiration of the thirty-day period criticized service of the summons on an eighteen year old immigrant girl who was unfamiliar with the English language, and conduct of plaintiffs' attorneys calculated to keep defendant in ignorance of the entry of the default judgment. In the instant case there was no deception or misconduct.

The intent of the order of December 16, 1959, was to deny defendant's motion to vacate the decree. The chancellor had before him the record which has been summarized herein. His action is supported by the record. Therefore the order is affirmed.

ORDER AFFIRMED.

FRIEND and BRYANT, JJ., CONCUR.



28 #4

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48016

WILLIAM BENKOWSKY and CAROL  
BENKOWSKY,

Plaintiffs-Appellants,

v.

CHICAGO TRANSIT AUTHORITY, a  
Municipal Corporation,

Defendant-Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

28 I.A.<sup>2d</sup> 257<sup>1</sup>

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an action for personal injuries and property damage based on a collision between a streetcar operated by an agent of the defendant and an automobile owned and operated by the plaintiff William Benkowsky and in which the plaintiff Carol Benkowsky, his daughter, was riding as a passenger. The case was tried by a jury which returned a verdict in favor of the defendant, the Chicago Transit Authority. This appeal is taken from a denial of the plaintiffs' post-trial motion to set aside the jury verdict and grant a new trial.

The plaintiffs base this appeal on the grounds that the jury verdict is against the manifest weight of the evidence and that the trial judge erred in giving instructions for the defendant, abused its discretion in permitting cross-examination of the plaintiffs' witnesses and showed its lack of impartiality in the case by numerous interruptions and remarks, indicating his disbelief of plaintiffs' witnesses.

The accident happened at the intersection of Clark and Ontario Streets in Chicago at approximately 5:00 p.m. on December



19, 1956. The front of the northbound streetcar hit the left rear of the plaintiffs' west bound vehicle. The chief point of contention is whether the streetcar entered the intersection in violation of a red light.

The defendant claims that the streetcar entered the intersection just as the light was changing from green to amber and that the jury had ample support for its verdict, either on the ground that the defendant was not negligent or that the plaintiffs were contributorily negligent. The plaintiffs contend that they proved their version of the accident and that the jury verdict against them is contrary to the manifest weight of the evidence and must be reversed. Their version, they say, is adequately supported by four witnesses, two of whom were disinterested, and that the physical facts increase the probability of the truth of these witnesses.

The first disinterested witness was Van Hicklin, a doorman stationed at the northwest corner of the intersection. He stated that after the collision, he noted that the Clark Street traffic light, the traffic signal for the north bound streetcar, was red. This does not conflict with the defendant's version, as the amber light lasts only three seconds and would obviously have turned to red at the time of the impact..

The only other disinterested witness was Santos, a passenger on the north bound streetcar. He testified that the Clark Street light was red when the streetcar stopped to discharge passengers, red when it started up and red when it entered the





intersection. However, in an earlier statement given to the Chicago Transit Authority, he had stated that the streetcar started forward on the yellow light. In an apparent attempt to resolve this discrepancy, he explained that when he gave the statement to the C.T.A., he didn't know whether the light was red or yellow, but that he now knows that the light was red. The defendant says that these and other statements must have discredited Santos in the eyes of the jury and that the jury was justified in giving little or no credence to a testimony that contained within itself so many omissions, discrepancies and improbabilities. This witness may well have been impeached by his own testimony and we are not able to say that the jury was unjustified in rejecting his version of the accident.

The plaintiff William Benkowsky testified that he entered the intersection on a green light at approximately 18 m.p.h. and that he first noticed the north bound streetcar when he had reached the first rail of the north bound track. He estimated that the streetcar was about 45 feet away and that he thought the streetcar was standing still. As he phrased it, "Well, I was confident I had the green light. I thought it was standing there, but I was wrong. All of a sudden I heard a big crash and from then on, I went flying."

The defendant argued before the jury that this version is contrary to physical facts for if the streetcar was 45 feet away from his position and just starting up from a complete



stop and the plaintiffs' car was already at the first rail and traveling at the rate of 18 m.p.h., the collision in the intersection would not have happened. The defendant now says that the plaintiff was impeached in his testimony as to other material facts as well and that a jury verdict in its favor was justified.

In determining the question of the sufficiency of the evidence before a reviewing court in an appeal of a denial of a motion for a new trial, the question is whether the verdict is against the manifest weight of the evidence. To be against the manifest weight of the evidence requires that an opposite conclusion be clearly evident or, stated differently, that the jury's verdict be palpably erroneous. *Bunton v. Illinois Central Railroad Co.*, 15 Ill. App. 2d, 311. A verdict will not be set aside merely because the jury could have found differently or because judges feel that other conclusions would be more reasonable. *Kahn v. James Burton Co.*, 5 Ill. 2d. 614, 623. The jury evidently was not persuaded by the plaintiffs' version of the accident and we are not inclined to say that its conclusion was so unreasonable as to warrant a new trial.

The plaintiffs' next objection is that three of the instructions given were incorrect, and that this objectionable series of instructions constituted reversible error. Instruction number 9 was the standard "plaintiff interest" instruction. The jury was told that they had a right to take into consideration



the fact that the plaintiffs were interested in the result of the suit. The plaintiffs quote Hartshorn v. Hartshorn, 179 Ill. App. 421, for the proposition that "the instruction is erroneous...because it singles out the testimony of one party and makes no reference to the testimony of the other equally interested party, and it is calculated to lead the jury to understand that the Court considers that there is some reason why the evidence of the party referred to in the instruction is specially subject to criticism and should be particularly scrutinized by the jury." 179 Ill. App. 424. This would support the plaintiffs' contention, except for the fact that the deleted portion indicates that such a rationale is inapplicable where the defendant is a corporation. The plaintiffs should have quoted the entire portion of the quotation, in which the court especially restricts its ruling to the situation where "...both plaintiff and defendant are natural persons and have testified...". 179 Ill. App. 421, 424. Consequently, this case is authority for the opposite conclusion from the one cited by the plaintiffs.

Instruction number 12 told the jury that they should not disregard an unimpeached defendant's witness simply because the witness was an employee of the defendant. This has also been upheld in Illinois where the case involved an employee of a corporate defendant. Segal v. Chicago City Ry. Co., 256 Ill. App. 569, 578-9. Instruction number 24 dealt with the impeachment of the witness by contradictory testimony. This was also a stock instruction and has been approved.





Zelinski v. C. & N.W. Ry., 336 Ill. App. 49, 52-3.

We have considered all of the instructions and believe that in view of what we have said in regard to the law it is clear that the instructions given, taken as a whole, substantially and fairly presented the law of the case to the jury and that there was no prejudice in either giving or refusing instructions. Rylander v. Chicago Short Line Ry. Co., 19 Ill. App. 2d, 29, 59.

The plaintiffs next contend that the court abused its discretion in permitting cross-examination and in controlling the conduct and argument of counsel. The defendant denies that there was any abuse of discretion and maintains that the cross-examination was necessary to impeach the plaintiff William Benkowsky by prior contradictory statements. The plaintiffs argue that there were no inconsistencies between the story given on the deposition and the story given on direct examination. Defendant's counsel cites three specific points where there existed a discrepancy between the statements on trial and statements in the deposition. These dealt with the question of the position and distance of the plaintiff William Benkowsky when he first saw the traffic light and the streetcar and whether he was unconscious after the accident.

The first point is somewhat typical of the others. Plaintiff answered on direct examination that he first saw the streetcar when he reached the first rail of the north bound track. The defendant attempted to impeach this by a prior contradictory statement given in his deposition that he first



saw the streetcar when he was at the east curb. However, counsel did not quite succeed in his point as the witness was unable to grasp the purport of the questioning and the trial judge ruled against counsel's continuing with this matter on cross-examination.

The second variation was in Benkowsky's statement in his deposition that he was "not exactly" unconscious, in contrast to his testimony on direct examination that he was unconscious. The third source of inconsistency was Benkowsky's estimate of his distance from the intersection when he first looked at the traffic signal. In his deposition, he said that it was 20 feet, however, on direct, he revised this estimate to 25 to 30 feet. The court permitted the defendant's counsel to bring this discrepancy to the jury's attention.

It is apparent that the witness was properly cross-examined as to his prior inconsistent statements and that this was certainly within the wide latitude given to the trial court in limiting or permitting cross-examination. The rule is that "the trial court has broad discretion in controlling the scope of cross-examination and a case will be reversed only if such discretion has been clearly abused and the abuse materially affected the results of the trial." Meyer v. Williams, 15 Ill. App. 2d. 513, 517. The abuse, if there was any, was certainly not sufficient to affect the results of the trial.

The final point mentioned by the plaintiffs which warrants comment is that the court erred in interrupting witnesses for



plaintiff and in commenting on the witnesses. The plaintiffs cite various passages in the testimony of the plaintiffs' witnesses, however, these do not support their charge that the trial judge was unable to maintain a completely impartial attitude throughout the trial. The record shows that the questions and statements of the court were appropriate at the time and place made. We find no error in this regard.

The objections being without merit, the judgment of the lower court is affirmed.

AFFIRMED.

BURKE, P. J., and FRIEND, J., CONCUR.





48042

Jay H. Carl, d.b.a. The Jay H. Carl Agency,  
Plaintiff-Appellee,  
v.  
Ray G. Bohlman, d.b.a. R.C.B. Trucking Co.,  
Defendant-Appellant.

Appeal from the  
Municipal Court  
of Chicago.

20 I.A. 2572

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is a proceeding under Rule 1, section 72 of the Civil Practice Rules of the Municipal Court of Chicago (section 72 of the Civil Practice Act) to set aside a default judgment for \$4,739.58. Defendant's motion to vacate the default judgment and to obtain leave to appear and defend was denied and he has appealed.

The plaintiff, an insurance broker, sued the defendant, the owner of a trucking business, for moneys allegedly due on insurance premiums. The defendant says that he has a meritorious defense to the entire claim but that the plaintiff misled him into suffering the default judgment by his assurances that no action would be taken on the disputed claim until the parties could go over their accounts. He states that his reliance on these assurances was reasonable in view of the fact that they have had cordial business relations for over twenty years. He asserts that he acted with all due diligence as soon as he learned of the entry of the judgment and that the trial court abused its discretion in denying his petition.



The plaintiff did not deny or attack the petition by answer, counter-affidavit or motion and therefore the statements of fact contained in his petition must be taken as true. Lane v. Bohlig, 349 Ill. App. 487, 489.

The petitioner related that he was served with summons and a copy of the statement of claim on June 4, 1959 and that he filed a pro se appearance on June 9, 1959 in the office of the Clerk of the Municipal Court. He claimed that a deputy clerk there told him that the Clerk's Office would notify him by mail when to appear in court and that he should go home and forget about the matter until he received such notice.

He further related that on the following day, the plaintiff called him on the telephone, in response to his previous inquiries, and in that conversation, the petitioner informed the plaintiff that he was not indebted to him and that a careful check of his records would show that the petitioner had paid the plaintiff in full for all insurance plaintiff had ever written on his automobiles, trucks and real estate. The uncontroverted petition further recites "that the plaintiff said he was not feeling well and did not want to go into the matter at that time, that he would call petitioner as soon as his condition improved; and that the plaintiff then and there agreed and promised that he would not take any further action in this case without first giving petitioner ample notice and that it would not be necessary for petitioner to hire a lawyer to defend the case." The petitioner continued his inquiry on numerous other occasions after this conversation, two of which



occurred after July 3, 1959, the date of entry of the default judgment and in each instance, the plaintiff repeated his promise that he would not proceed with the case until the petitioner had had an opportunity to go over the accounts with him.

The uncontroverted petition further charges that in direct violation of his promise, the plaintiff did appear before a judge in the Municipal Court on July 3, 1959 and that when this cause was called on the Want to Answer call, caused petitioner to be defaulted for want of answer and caused a default judgment to be entered against the petitioner.

The petitioner also related that he was informed by his lawyers that an execution was issued on the default judgment which was returned No Part Satisfied on October 7, 1959. The Sheriff's endorsement indicated that the petitioner's brother, Fred Bohlman, was delivered a copy of the execution, however, the petitioner denies that he ever received any notice of this.

The petition is accompanied by an affidavit by the defendant's brother, who swore that when the copy of the execution was delivered to him as an agent of the corporation, he informed the deputy that the business was not incorporated. The affiant further recited that he destroyed the copy of the execution because he thought it was issued through mistake and that he never notified the defendant of the occurrence.

The petitioner further stated that the first time he became aware of the default judgment was on January 27, 1960





when he received a letter from the plaintiff informing him of his action. He stated that he immediately retained a law firm to look into the matter after this notice.

The question on this appeal is whether the trial court erred in denying the defendant's motion. On the basis of the uncontroverted statements in the petition, we think that this was an abuse of discretion. The petition shows a meritorious defense on its face. It indicates that the plaintiff misled the defendant into suffering the default and that the defendant's reliance on the plaintiff's promises was reasonable, especially in view of their long business association. Finally, it shows due diligence on the part of the defendant after he had notice of the default judgment. This was clearly a proper occasion for the application of equitable principles to prevent injustice under the authority of the Supreme Court's ruling in *Ellman v. De Ruiter*, 412 Ill. 285. We direct that the defendant be granted leave to appear and defend.

For the reasons given the order denying the petition is reversed and the cause remanded with directions to open the judgment and grant the defendant leave to appear and defend.

The order is reversed and the cause remanded for further proceedings.

BURKE, P.J. and  
FRIEND, J. concur.



BERNARD H. MILLER,  
Plaintiff-Appellee,  
v.  
WILLIAM G. VANNIER,  
Defendant-Appellant.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY

28 I.A.<sup>2d</sup> 258

Plaintiff sued to recover for injuries suffered on February 24, 1958. The court entered judgment on a verdict against defendant for \$30,000 and he appealed. Competent evidence established that the negligence of the defendant was the proximate cause of the injuries. The defendant does not contend that the damages awarded are excessive.

He maintains that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff testified that while walking west in the north pedestrian crosswalk which extended from the northeast corner of 63rd Place and Halsted Street to the west side of Halsted Street in Chicago, he stopped about three steps from the center line and looked to the north; that he could see 150 to 200 feet from where he was standing; that there were no vehicles southbound in either of the two lanes for moving vehicles on the west side of Halsted Street; that he looked across at a parked southbound bus at the west curb of Halsted Street which he intended to board; and that after taking about six steps to approximately three feet west of the center line of Halsted Street he was struck by defendant's southbound automobile. This testimony, together with evidence that defendant's



car was proceeding at 30 miles an hour, that he did not see plaintiff before striking him, that he did not slow down as he approached the intersection and gave no warning by horn of the approach of his vehicle, were sufficient to submit to the jury the issues of negligence of the defendant and contributory negligence of the plaintiff. See *Blumb v. Getz*, 366 Ill. 273; *Moran v. Gatz*, 390 Ill. 478; *Rees v. Spillane*, 341 Ill. App. 647. We conclude that competent testimony supports the issues of negligence which were properly submitted to the jury.

As a second point the defendant insists that because the verdict is against the manifest weight of the evidence on the issue of due care a new trial should have been granted. The jury necessarily found for the plaintiff on this issue and there is a strong basis in the evidence for this finding. The evidence of plaintiff's conduct in crossing the street and looking before he started to cross, waiting on the curb for northbound vehicles to clear the intersection, stopping a few steps from the center line, and again looking to the north for southbound vehicles before resuming his walk across the street supports the jury's finding in his favor on the issue of due care. We cannot say that the verdict is against the manifest weight of the evidence.

Defendant urges that he did not receive a fair trial because of improper cross-examination of himself and another witness. We do not find any impropriety in the cross-examination of defendant or his witness; nor do we find that plaintiff's attorney made an improper argument to the jury.





Defendant argues that the court erred in giving an instruction summarizing the complaint. He says it is unnecessarily long and a reproduction of the complaint, citing *Signa v. Alluri*, 351 Ill. App. 11, and other cases. We do not think that the court erred in giving this instruction. Defendant also charges error in the giving of an instruction in the language of the statute setting forth the rights and duties of a pedestrian in a crosswalk at an intersection, and the rights and duties of a motorist operating a motor vehicle approaching a pedestrian in a crosswalk at an intersection. The court was right in giving this instruction. See *Reese v. Buhle*, 16 Ill. App. 2d, 13; *Rees v. Spillane*, 341 Ill. 647. The action of the trial judge in refusing to give defendant's tendered instructions Nos. 3 and 6 cannot be criticized. The factual situation did not require the giving of tendered Instruction No. 3. Tendered Instruction No. 6 informed the jurors of their duties in deliberating and arriving at a verdict. Other instructions adequately informed the jurors of their duties. There was no error in refusing to give this instruction.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED

FRIEND, J., and  
BRYANT, J., Concur



28 H 5

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THE AMERICAN INSURANCE COMPANY, )  
a corporation, )  
Plaintiff-Appellee, )  
vs. )  
MAURICE L. ROSENBERG, d/b/a )  
IRMASAM FURS & GOLDSMITH, )  
Defendant-Appellant. )

APPEAL FROM THE  
SUPERIOR COURT  
OF COOK COUNTY.

28 I.A.<sup>2d</sup> 357

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an action for declaratory judgment brought by plaintiff,

American Insurance Company, against its assured, to obtain an adjudication of non-liability under a "furrier block" form of insurance. This appeal is taken by defendant, from a judgment in favor of plaintiff, entered upon the pleadings.

The material facts are not in dispute. Defendant, Maurice L.

Rosenberg, doing business as Irmassam Furs & Goldsmith, a furrier in Chicago, shipped a package of furs valued at \$5,790.75 from New York to Chicago through Angstreich & Associates. The Agent had been instructed by Irmassam to insure the furs in accordance with the provisions of the

insurance agreement which is as follows:

"5. Property in custody of public or common carriers or postal authorities is not covered unless shipped subject to the following conditions:

\* \* \* \*



C. Air freight by (1) Civil Aeronautics Board certificated scheduled air carriers, including while in the custody of agents of such air carriers, or (2) by air freight forwarders; provided that on each shipping package sent by the Assured, his officers, agents, servants or employees, a value declaration is made to the carrier or freight forwarder of not less than 25% of the actual value of the contents of the shipping package, but not necessarily more than \$1,000.00 per package;"

The Agent shipped the furs to Irmasam's Chicago office by air

freight and declared its value at \$750.00, contrary to the policy provision.

The package was never delivered. Thereafter, Irmasam's claim against plaintiff for \$5,790.75, the actual value of the furs, was refused by plaintiff.

Irmasam admits its failure to comply with the proper designated value declaration. Irmasam contends, however, that the foregoing provisions of the policy constitute a condition subsequent, and the failure to perform should not prevent recovery on the theory that (1) the failure to perform the condition did not result in the loss; (2) the condition was immaterial to the risk undertaken by the insurer; and (3) defendant's substantial compliance with such condition was sufficient.

At the outset Irmasam presses the familiar principle that a contract of insurance will be construed most strongly against the insurer and a forfeiture of the policy will be avoided, if possible. Mack v. Liverpool,





etc., Insurance Co., 329 Ill. 158. Here, however, the rule of liberal construction of insurance policies must yield to reasonable rules to determine the enforceability of the contract. Thompson v. Fidelity Casualty Co., 16 Ill. App. 2d 159.

As Irmasam states in its reply brief the controlling question for us is whether the inserted proviso accepted by the assured is a condition precedent or a condition subsequent. The terms of this provision are simply worded and were known to Irmasam, as is indicated by its attempt to comply. The policy, by its terms, did not become operative as to furs in transit until a proper declaration of value was made by the defendant. Since this condition was not met, we hold that the furs in transit were not covered by the policy. The parties in this case have provided in their contract that property "is not covered" when in the hands of a public or common carrier, but that property shipped by air freight will be covered if certain conditions regarding value declarations are met. Thus, in defining the risk, the insurance contract generally excludes property in the custody of carriers, and it then provides that in certain instances further coverage would be extended to the insured upon his performance of further acts.



A condition precedent is one which is to be performed before the contract becomes effective, and it calls for the happening of some event or the performance of some act, after the terms of the contract have been agreed on, before the contract shall be binding on the parties. *Sezurek v. American National Insurance Co.*, 309 Ill. App. 260; *National Dairymen Ass'n. v. Dean Milk Co.*, 183 F.2d 349; *Getz v. City of Harvey*, 118 F.2d 817, and *Crawford v. Abraham Lincoln Life Ins. Co.*, 278 Ill. App. 576. Before the insurance became effective a list of pets as provided in the policy contract had to be furnished the insurer, in *Joseph Ullmann Brokerage Corp. v. Zimbal*, 112 N. Y. S.2d 70. A provision somewhat similar to ours was involved in *Ferguson v. Penn Mutual Life Ins. Co.*, 305 Ill. App. 537. "As heretofore shown the policy provides: 'Disability benefits shall become effective...as of a date six months prior to the receipt of such proof;... provided such proof is received by the Company during the continuance of said disability.' This language is not ambiguous. It is plain and understandable American. It clearly expresses a condition precedent."

Irmasam contends that paragraph 5 (c) expresses a condition subsequent and refers us to *Sturmer v. Travelers Ins. Co.*, 279 Ill. App.



607, and Sczurek v. American National Ins. Co., 309 Ill. App. 260. In

Sturmer the primary question was whether an employee who had left his employment prior to his death was covered by a group life insurance policy.

The court there held "...as the condition in regard to employment is one

which necessarily must arise after the issuance of the policy...it becomes

a condition subsequent...." In Sczurek, the failure to deliver the policy to

the insurer was held not to be a condition precedent to a claim for life in-

surance. There the policy was introduced in evidence and the court in

effect held that the delivery of the policy to the insurer was only an incident

to proof of loss. In the instant case the proper value declaration was a

positive act to be performed by Irmasam before the insurance agreement

became effective, and was not a condition subsequent based upon the happening

of some event which might arise and operate to defeat or annul the contract

after its formation.

Irmasam further contends that the loss was not caused by the

breach and therefore its failure to comply does not defeat the policy, citing

Traders' Ins. Co. v. Race, 142 Ill. 338; Weininger v. Metropolitan Fire Ins.

Co., 359 Ill. 584; Crete Farmers' Mutual Township Ins. Co. v. Miller, 70





Ill. App. 599; and Fire Association of Philadelphia v. Short, 100 Ill. App. 553.

A review of these cases reveals that they involve attempts to avoid the policies because of an increase in hazard, which by its very nature is a condition subsequent.

Counsel for Irmasam argues that substantial compliance is sufficient, citing Kaplan v. U. S. Fidelity & Guaranty Co., 255 Ill. App. 437, aff'd., 343 Ill. 44. The main issue in this case was whether an employee was a custodian, as required by the policy, or a porter, and the Appellate Court held this to be a condition subsequent and that substantial compliance was sufficient.

Where a contract is not ambiguous or uncertain, its meaning must be determined from the words or language used, and the court cannot place a construction on the contract which is contrary to, or different from, the plain and obvious meaning of the language actually used.

Lastly, Irmasam contends that inasmuch as the deviation from the policy requirements did not cause the loss of the furs and did not increase the risk of loss we therefore should find he is entitled to recover on his policy the full value of the lost furs, less \$250.00 to make good plaintiff's loss in



its subrogation claim against the air freight forwarder. If we were to use this standard we would then have to conclude that, had Irmasam taken out a trivial amount of insurance, the policy would have been complied with so long as the risk of loss was not increased. The contract clause regarding value declarations purports to extinguish no legal relationship or work any forfeiture; if subparagraph C of the policy had been omitted, the furs would still not have been insured.

For the reasons given the judgment of the trial court is affirmed.

AFFIRMED.

KILEY, P. J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.



28 #5

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48136

RAPHAL BORRERO and JOSE GONZALES )  
GOMEZ, )

Appellees, )

v. )

ELGIN, JOLIET & EASTERN RAILWAY )  
COMPANY, a corporation, )

Appellant. )

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

28 I.A.<sup>2d</sup> 362

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an action under the Federal Employers' Liability Act by two section laborers against defendant, the Elgin, Joliet & Eastern Railway Company, their employer. Defendant appeals from jury verdicts of \$22,000 in favor of plaintiff Borrero and \$66,000 in favor of plaintiff Gomez.

Plaintiffs were struck by defendant's unscheduled freight train, while walking on defendant's main-line, double-track bridge over N. Y. C. and B. & O. main-line tracks. Defendant's tracks in the area are elevated and also pass over a public highway to the south. The double bridge is a mile west of defendant's Kirk Yard, Gary, Indiana, and is about 200 feet in length. It extends in a northeasterly and southwesterly direction. Its immediate north approach is a sharp 1,000-foot long, upgrade curve from the east.

The plaintiffs are Puerto Ricans and testified through an interpreter. Borrero had worked for defendant as a section





laborer since November, 1956, and Gomez since April, 1957. On the morning of November 19, 1957, a crew of about thirty section laborers, which included plaintiffs, was transported in defendant's bus from its Kirk Yard to a ground-level point north and west of the double bridge and north of the N. Y. C. tracks. Leaving defendant's bus, the crew climbed up and onto defendant's right of way, walked south across the bridge and several hundred feet beyond it to the place of work for the day. They had been working in the area south of the bridge for several days, repairing defendant's tracks after a derailment.

In the afternoon, the crew foreman returned to the Kirk Yard and left in charge a laborer, Romero Chavez, who was also the bus driver. At about four o'clock, Chavez said, "Let's go," and the crew started back to the bus, which had remained parked north of the bridge. It was dark, cloudy and cold. There was a train standing on the tracks beneath the bridge, so they started north to cross the bridge, walking single file and carrying their tools. Chavez was the last of the group, as he was checking to see that all tools were taken along.

As the men walked north toward the bridge, defendant's 65-car eastbound train was moving north over the bridge, on the right-hand or easternmost track. Chavez had warned the men of the approach of this train, and they had stepped over to the westbound track to be out of its way. Four of the men proceeded onto the



bridge while the eastbound train was still on it; Valentin was first, followed by Lopez; Gomez and Borrero, the last two men to enter the bridge, followed some 60 or 70 feet behind them, walking between the westbound track and the west wall of the bridge; and Cruz, the next in line, stepped to the side south of the bridge, "waiting for the train to get off." When Valentin and Lopez were about 20 feet from the north end of the bridge, they saw a westbound train coming from the north around the curve and entering the bridge. They jumped to the side and stood safely in the openings between the girders and the floor of the bridge. Borrero and Gomez, 60 to 70 feet behind, were struck by the train, knocked unconscious and injured. They did not see or hear the train, nor did they hear the warning of Chavez, 500 or 600 feet to the south of the bridge, nor the shout of Valentin before he jumped out of its way. Borrero testified, "I was walking forward, looking down, and looking forward at the same time, because I didn't want to fall down. There were stones on the floor and railroad ties." Gomez testified, "I had to look back down again because it was danger underneath. \* \* \* I was looking more down than up, because I was watching the floor."

Plaintiffs' witnesses estimated the train speed to be 25 to 35 miles per hour. The engineer testified that he did not sound the whistle or give any warning as he approached the bridge. He did not see plaintiffs and did not know that he had struck them



until later that evening. The engine speedometer showed 15 miles per hour, and the train could not be stopped in less than 300 feet.

Defendant's principal contentions are that the sole cause of plaintiffs' injuries "was the carelessness of the plaintiffs themselves"; that "there was no evidence to sustain any of the charges of negligence upon which the case was submitted to the jury; that the court erred in instructing the jury; and the verdicts are excessive." Three charges of negligence were submitted to the jury: failure to give notice or warning of the approaching train; failure to maintain a proper lookout; and failure to furnish a safe place to work.

Defendant admits that the engineer gave no warning and argues, in the absence of statute or rule, none was required, because there was no reason to anticipate that anyone would be on the bridge while another train was passing over it; that plaintiffs "were in a hurry to get to the bus"; and that the train on the track below, which "blocked the normal way of going down the embankment south of the bridge," was not the responsibility of the defendant, nor visible to the engineer. Defendant contends there was sufficient notice or warning of the approaching train, because Valentin and Lopez both saw it when they were 20 feet from the end of the bridge, and Valentin shouted a warning before they jumped into a place of safety; also, that Chavez, about 600 feet away, shouted a warning "which plaintiffs probably could not hear because of their heavy winter caps."





Defendant concedes "its duty was to exercise reasonable care to provide a reasonably safe passage" to the bus, and states that if the men had waited three or four minutes, the bridge would have been "completely safe" to walk across. Also, that measured by the conduct of their fellow crew members, plaintiffs failed to meet the test of the conduct of reasonable men; that they should have waited until the bridge was clear, as most of the crew members did, or ought to have looked and listened, as Valentin and Lopez did; and, therefore, there was nothing which defendant could do to prevent the occurrence.

The Federal Employers' Liability Act makes a carrier liable in damages for any injury or death "resulting in whole or in part from the negligence" of any of its "officers, agents or employees." The defense of assumption of risk is abolished, and contributory negligence of plaintiffs does not bar a recovery. (45 U.S.C. 51, 54.) It is the duty of a railroad company to furnish its employees with a reasonably safe place to work, "a duty which becomes imperative and exacting as the risk increases." Larsen v. Chicago & N. W. Ry. Co., 171 F.2d 841, 844 (1948).

On appellate review, the basic question is whether there is any evidence, considered in the light most favorable to the plaintiff, that defendant was guilty of negligence which contributed in whole or in part to plaintiff's injury. "Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear." (Bonnier v. C. B. & O.



Ry. Co., 2 Ill. 2d 606, 608, 611 (1954).) The Appellate Court's function is exhausted when an evidentiary basis for the jury's verdict becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. Allendorf v. Elgin, J. & E. Ry. Co., 8 Ill. 2d 164, 171 (1956).

The parking of the bus in an area where access was limited; and the nature of the available routes to the bus; the hazards of the route taken under the direction of the acting foreman; the care required to walk safely; the visibility and headgear worn; the adequacy of the warning shouts of other crew members; the lack of warning by the engineer and the speed of the engine which struck plaintiffs; and the fact that there was a train on the bridge when plaintiffs entered and no warning measures taken as to other trains, are probative facts and circumstances sufficient for the jury to weigh and determine whether defendant was guilty of negligence which contributed in whole or in part to plaintiffs' injuries. Webb v. Ill. Central Ry. Co., 352 U.S. 512 (1957).

Considering the record as a whole, we believe it contains sufficient evidence to establish a reasonable basis from which the jury might conclude that the defendant was guilty of negligence in failing to give notice, in failing to maintain a proper lookout, and in failing to furnish a safe place to work. Whether or not plaintiffs failed to exercise due care for their own safety is not



material to the primary question of whether or not defendant is liable, because contributory negligence is not a defense under the Federal Employers' Liability Act. (Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135 (1955).) In our opinion, the court was correct in its determination of the issues to be submitted to the jury.

Defendant contends there was serious and prejudicial error committed in the court's instructions to the jury, and specifically complains of a "safe place to work" peremptory instruction, in that it submitted to the jury "the safe place to work theory as an independent ground of negligence." It relies principally on Starck v. Chicago & N.W. Ry. Co., 4 Ill. 2d 611, 621 (1955), and Chicago & N.W. Ry. Co. v. Garwood, 167 F.2d 848 (1948). We believe the evidence here is sufficient to bring this case within the "safe place to work" rule. (McCray v. Ill. Central Ry. Co., 12 Ill. App. 2d 425, 433 (1957); Pitrowski v. New York Central and St. Louis Ry. Co., 4 Ill. 2d 125, 130 (1954).) The jury could reasonably have found that the route to the bus, under the conditions portrayed, was not a reasonably safe place to work. "To the maximum extent proper, questions in actions arising under the Act should be left to the jury." (Bonnier v. C. B. & Q. Ry. Co., 2 Ill. 2d 606, 611 (1954).) We do not consider it was error to give the peremptory instruction, which included the "safe place to work" charge.





Defendant also complains of an instruction which said that it was the duty of defendant, "at the time and place in question to exercise reasonable care and prudence to provide the plaintiff \* \* \* with a safe place to work and to use reasonable care and caution to keep such place in a reasonably safe condition." It contends that this misstates defendant's duty, which is "to use reasonable care in furnishing its employees with a reasonably safe place to work." (Anderson v. Elgin, J. & E. Ry. Co., 227 F.2d 91, 97 (1955).) If erroneous, we feel there was no prejudicial error, because of an instruction given at defendant's request, as follows: "The defendant was not required under the law to furnish for plaintiff a way by which to leave his place of work which was absolutely safe. Its duty in that respect was to exercise reasonable and ordinary care to provide a reasonably safe way for plaintiff to leave his place of work at the time of the accident in question." We believe this instruction fully pointed out the duty and responsibility of defendant, and that the jury was not misled.

Defendant did not plead any defense of assumption of risk, and contends that the giving of an instruction that an employee, under the Act, does not assume the risks of his employment was improper, and that "the obvious effect of the instruction was to deprive the defendant of the benefit of the limited defense of plaintiffs' contributory negligence." Defendant's cross-examination of plaintiffs indicates an effort to show that the sole cause of



plaintiffs' injuries was the carelessness of the plaintiffs themselves, and that they failed to meet the test of the conduct of reasonable men. We believe this cross-examination shows an attempt to develop an evidentiary basis for use of the defense of the doctrine of assumed risk by changing its name to contributory negligence. "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' \* \* \* 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name.'" (Tiller v. Atlantic Coast Line Ry. Co., 318 U.S. 54, 58 (1943).) We cannot say, in this case, that the giving of this instruction was error.

Defendant contends that a number of errors were committed which may have affected the amounts of the verdicts. Defendant argues that the instruction on damages permitted the jury to triple, or even quadruple, the allowance for pain, which produces some disability and some inability to work. The instruction sets out the elements of damages the jury could consider as a whole, and each element is qualified "if any is shown by the greater weight of the evidence." We do not believe that the jury was misled by this instruction.



Complaint is also made that in both verdicts the amount is stated only in numerals, and that the verdicts demonstrate "that the jury had little comprehension of the dollar meaning of their verdicts." We have examined the verdicts and believe there is no doubt as to the meaning of the jury in either verdict and what the jury intended to find. Western Springs Park District v. Lawrence, 343 Ill. 302 (1931).

The trial court denied defendant's motion for a mistrial, because of testimony of plaintiffs' witness Chavez, developed under cross-examination, that defendant's Claim Department had informed him that he need not appear in response to a subpoena received from plaintiffs' attorneys. At defendant's request, the jury was given an instruction that defendant was acting within its rights in advising the witness not to appear in response to the subpoena, which was served on him in Indiana. We have examined the record and find no prejudicial error here.

Defendant complains that the verdicts are grossly excessive, and that the jury obviously failed to give any weight to the contributory negligence of the plaintiffs and, therefore, the verdicts are excessive as a matter of law. Plaintiffs contend, to review the amount of the verdict, we must reweigh the evidence, and where there is an evidentiary basis for the verdict, it is error for an Appellate Court to reweigh the evidence and set aside the jury verdict (Bowman v. Ill. Central Ry. Co., 11 Ill. 2d 186 (1957)),





and "that the power to review the size of the verdict is likewise so limited" (Pennell v. Baltimore & Ohio Ry. Co., 13 Ill. App. 2d 433, 439 (1957)); and that it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. Allendorf v. Elgin, J. & E. Ry. Co., 8 Ill. 2d 164 (1956).

Defendant contends that if excessiveness of a verdict is reviewable on appeal under state practice, it is reviewable in a Federal Employers' Liability Act case and cites Smith v. Ill. Central Ry. Co., 26 Ill. App. 2d 133 (1960), to show that "the Pennell case has been overruled." Because of our conclusion on the question of damages hereinafter given, it is unnecessary for us to discuss either contention.

The evidence as to Gomez shows that at the time of his injury he was 40 years of age, had 7 years of schooling and was in good physical condition; that he had fractures of the middle third of the right femur, of the middle third of the right ulna, and of the right radius, three fractured ribs and a four-inch laceration of the left leg; that the fractures of the femur and ulna were treated by the insertion of medullary pins, later removed, and the fracture of the radius by a plate and screws, which were left in the arm; that the rib fractures healed in good position; that his end result was some stiffness of his knuckle joints, a fifteen degree loss of motion of the right wrist, some contracture of the elbow and thickening and swelling of the right knee and hip, with



a fifteen degree loss of flexion at the knee; that further physical therapy "may be expected to reduce, and perhaps in time eliminate the pain" in the right arm and right leg.

There is medical testimony that a condition of pain in the right arm is permanent; loss of movement of the wrist is permanent; loss of strength is permanent; pain in right leg is permanent; inability to walk over a rough road or up and down stairways without difficulty is permanent. There is further testimony that he could no longer do laborious work.

The evidence as to Borrero is that at the time of the occurrence he was 32 years old, in good health and had 3 years' schooling. His injuries consisted of lacerations of the lower lip and of the left parietal region of the scalp, an abrasion of the right forearm, and a contusion and discoloration of the sacral area of the back. The facial lacerations healed, and the abrasion of the left forearm disappeared. The contused area of the back was aspirated several times. He complains of constant pain in the back, and there is medical testimony of painful trigger points in the lumbrosacral area, which meant instability of the sacroiliac ligaments; that it is likely he will remain with an unstable back, and his condition has some degree of permanency. Defendant's doctors, who had treated both plaintiffs and who had examined them, testified that both had good recoveries and were able to return to their regular work as section laborers.



The verdicts do seem liberal, and the medical evidence as to the ability of both to return to manual labor is controversial, but we cannot say, as a matter of law, that the verdicts are excessive. The record is sufficient to furnish the jury with an "evidentiary basis" for both verdicts. We find no reason to depart from the usual rule that the assessment of damages is the pre-eminent function of the jury. Kahn v. James Burton Co., 5 Ill. 2d 614 (1955).

Considering all the evidence in this record in the light most favorable to the plaintiffs, we conclude that there was sufficient evidence for the jury to find that defendant's negligence contributed, at least in part, to plaintiffs' injuries, and as we find no reversible error in the trial, the judgments are affirmed.

AFFIRMED.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.





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People ex rel Mary T. McAleer,  
et al, ~~Plaintiffs~~  
~~Defendants~~ below,  
On Appeal of Margaret O'Donnell,  
et al,  
Appellants  
vs.

)  
)  
) APPEAL FROM  
)  
) SUPERIOR COURT  
)  
) COOK COUNTY  
)

Albert W. Williams and John J.  
Ahern, Members of and constituting  
the Chicago Civil Service Comm.,  
and Timothy J. O'Connor, Com-  
missioner of Police of the  
City of Chicago,  
Appellees.

28 I.A.<sup>2d</sup> 421

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding to compel the Commissioner of Police and the Civil Service Commissioners to fill, from a civil service list, vacancies in positions of policewomen. The court denied the writ, dismissed the suit and plaintiffs, Margaret O'Donnell and Lillian M. Glienke, have appealed.

Our recital of facts is from a stipulation made by the parties and from testimony of Deputy Director of Budget, Arthur Lindell.

Plaintiffs have been on the eligible civil service list for policewomen since 1952. No certifications have been made from the list since 1955 although several policewomen have been separated from the police department since that time. For the year 1956 the Commissioner of Police requested an appropriation for 79 policewomen and in 1957 and 1958 requested appropriation for 84. Amounts sufficient to pay those numbers were recommended by Lindell to the Mayor and by the latter recommended to the City Council which appropriated



2.

those amounts.

The theory of plaintiffs' suit is that there are vacancies in positions of policewomen for which the City Council has appropriated salaries and that the Commissioner of Police and the Civil Service Commission had the duty to fill the vacancies. They claim error in the denial of the writ.

The question is whether plaintiffs proved at the trial that they were entitled to the writ. It is fundamental that the writ of mandamus should not issue unless the right to the writ is clear. Walter Rogers, Inc. v. Mortimer, 19 Ill. App.2d 381 (1958). In order to prevail plaintiffs must persuade us that the defendants' duties were clear. Ibid.

In support of the judgment, the defendants argue that the record discloses no vacancies in the position of policewoman; that the trial court erred in admitting the testimony of Lindell, Deputy Director of the Budget, to modify the appropriation ordinance; and that assuming vacancies did exist, the Commissioner of Police had discretion under a city ordinance with respect to filling vacancies.

We think that the trial court could find there had been no clear showing that vacancies existed in positions of policewomen.

The annual appropriation ordinances set up a lump sum appropriation for policewomen each year for the years 1957, 1958 and 1959. The 1957 appropriation is typical.



3.

Code	No.	Rate
7035	Policewomen:	
	First year of service.....	4,734.
	Second year of service.....	4,896.
	Third year of service	
	and thereafter.....	5,220.
		50,458,997.
	Total	52,870,879.

Plaintiffs argue that vacancies are shown by dividing the total amount appropriated by the salary for policewoman. The result of the division, they claim, would be the number of vacancies.

Lindell testified that there were pay increases made from time to time during the years according to a "salary advancement schedule". There is no testimony as to how much of the appropriation is needed for this purpose. There is nothing to show that money was available in the fund appropriated for more policewomen than were being employed. There is nothing to show that the City Council may not have anticipated eventualities to be provided for or to be protected against which would affect the number of policewomen to be employed or the money available for the employment of policewomen.

In drawing on testimony of Lindell we are assuming, but expressly not deciding, that it was admissible.

There is an hiatus in the testimony as to what occurred between the submission of the recommendation of the Mayor and the action of the City Council. Under Ill. Rev. Stat. ch.24, §22-1 (1959), the "corporate authorities . . . may appropriate such sums of money as are deemed necessary". That section also





4.

provides that the Mayor shall submit to the City Council the "Executive Budget" and that the budget ". . . as the same may be revised or altered by the corporate authorities, shall provide the basis upon which the annual appropriation ordinance is prepared. . . ." There is nothing to show that the City Council, in establishing the appropriation for policewomen, issued a "command to the Commissioner of Police to fill these vacancies". The City Council may have "deemed" only 69 policewomen were "necessary" and set up additional funds in order to give the department head flexibility in dealing with whatever circumstances required during the year.

It follows that People ex rel. Roderick v. City of Chicago, 283 Ill. 462 (1918), and People ex rel. Watters v. Finn, 241 Ill. App. 621 (1926), are not pertinent. Those cases dealt with vacancies in positions specified in budgets.

Having decided there is a failure to prove that vacancies existed in position of policewoman, we need not pass on the alleged duty of defendants to fill vacancies nor construe the City Ordinance giving the Commissioner of Police discretion in filling vacancies.

For the reasons stated in the opinion we think that the trial court did not err in denying the writ.

AFFIRMED.

BURMAN and MURPHY, JJ. Concur.

ABSTRACT ONLY.



28#5

2nd DIVISION

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Gen. No. 11408

Agenda 4

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT - SECOND DIVISION  
OCTOBER TERM, A. D. 1960

FILED

JAN 24 1961

PAUL V. WUNDER  
Clark Appellate Court Second District

KATHERINE KEASEL SMYTHE,  
Plaintiff-Appellant,

-vs-

PAUL H. SMYTHE, Jr.,  
Defendant-Appellee.

Appeal from the  
Circuit Court of  
Lake County.

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CROW, P. J.

28 I.A. 422<sup>2d</sup>

On December 20, 1957 the plaintiff, Katherine K. Smythe, filed a verified petition to modify a decree of divorce entered on January 13, 1948 between her and the defendant Paul H. Smythe, Jr., which had granted her a divorce and certain other relief. The basis of the plaintiff's petition to modify, as stated in her brief here, is that the defendant allegedly fraudulently obtained plaintiff's agreement to a property settlement and alimony agreement, which was adopted by the Court as a part of the decree, that he concealed his true wealth, had no intention of carrying out the agreement, did not perform the agreement, and fraudulently deprived the plaintiff of the benefits of the same. The defendant filed a verified motion to dismiss the petition, setting forth five different reasons for dismissal, including res judicata, lack of jurisdiction of the subject matter, laches of the plaintiff, and the fifth reason for dismissal is as follows:

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Case No. 11402

FILED

JAN 2 1900  
PAUL A. WUNDER  
Clerk Supreme Court Second District

IN THE  
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - SECOND DIVISION

OUTCOME TERM, A. D. 1900

Appeal from the  
Circuit Court of  
Lake County.

ANTONIO DE NEZAR SUZINE,  
Plaintiff-Appellant,

-vs-

PAUL H. WITTE, Jr.,  
Defendant-Appellee.

381A-122

Case, T. J.

On December 20, 1897 the plaintiff, Antonio F. Suzine,  
filed a verified petition to modify a decree of divorce entered  
on January 12, 1898 between her and the defendant Paul H.  
Witte, Jr., which had granted her a divorce and certain other  
relief. The facts of the plaintiff's petition are briefly as  
follows: That she is still married to the defendant although the  
deed in her favor here, is that the defendant allegedly trans-  
acted with the plaintiff's property in a property settlement  
and alimony agreement, which was adopted by the court as a part  
of the decree, that he concealed the true worth, and in some  
kind of carrying out the agreement, did not perform the agree-  
ment, and fraudulently deprived the plaintiff of the benefits  
of the same. The defendant filed a verified answer to dis-  
miss the petition, setting forth the different reasons for dismissal,  
including the fact of the plaintiff's failure to show that  
the facts of the plaintiff, and the facts of the case, for dismissal  
is as follows:



"Said petition sets forth conclusions of the pleader and not facts upon which such conclusions could be based. Allegation of fraud as a conclusion is not sufficient but the facts warranting such a conclusion must be stated."

The plaintiff filed a verified reply to the motion to dismiss.

On January 8, 1960 the Court entered an order on the defendant's motion to dismiss the plaintiff's petition, found that said petition as a matter of law was insufficient to give the court jurisdiction to grant the relief prayed, and denied the same. The plaintiff appeals therefrom.

Paragraphs 6 and 7 of the plaintiff's petition to modify are as follows:

"6. That the aforesaid property settlement agreement was entered into by Petitioner in good faith as a contemplated settlement of her property rights arising under the marriage, but nevertheless, the Respondent, Paul H. Smythe, Jr., acting wilfully, contrived to conceal from your Petitioner his true wealth and, by artifice, falsehood, and concealment, contrived to hide great sums of his assets in divers vaults and banks, so that your Petitioner would not be able to receive the just and equitable property settlement to which she was entitled.

"7. That said Respondent, at the time of the entry of the aforesaid property settlement agreement, never intended to carry out his obligation thereunder, but fully intended to enter said agreement merely as a lever to induce Petitioner to agree to a divorce."

The balance of the petition alleges that on February 27, 1951, a decree of partition and sale was entered in the same Court in certain partition cases concerning certain farm land in Lake County, that a certain property settlement agreement was incorporated in the divorce Decree of January 13, 1948, refers to MASTERS v. SMYTHE et al. (1950) 342 Ill. App. 185 involving the partition cases, alleges that as a consequence of the defendant's failure





to carry out his covenants the plaintiff had to institute the partition proceedings and the property was sold, says that because of the wrongful acts of the defendant she has been deprived of the home, income, furniture, fuel, rent, electricity, and food contemplated by the divorce decree, alleges that because of the constant iniquitous conduct of the defendant the plaintiff has been without proper means to file the petition until now and is forced by his misconduct to file this petition, and the petition prays that an account be had of the wealth of the defendant as of the time of the divorce decree, the decree be modified to give her a lump sum to replace the home, income, furniture, fuel, electricity, and food contemplated by the decree, for a lien against the partitioned real estate, attorney's fees, and general relief.

The decree of divorce of January 13, 1948 recited a property settlement agreement under which, the plaintiff and defendant each owning a 1/2 interest in certain farm land, she leased her 1/2 to the defendant for 7 years, at certain annual rents, she to pay 1/2 of the mortgage, insurance, and tax obligations, she to occupy a small residence on the property until the termination of the 7 year lease, rent free, she to have certain furniture from another main residence, the defendant to furnish her a couple of heaters, pay her \$100.00 per month alimony, and pay her attorney's fees, which property settlement the Court found fair and equitable, and which the plaintiff then testified she understood and that she knew she had no further claim except for monthly alimony.

The defendant-appellee has filed no brief here. Although, under the circumstances, we would be warranted in reversing and

[illegible][illegible]

for the purpose of the investigation, the following is a list of the names of the persons who have been interviewed and the results of the investigation:

under the circumstances, we would be inclined to consider and



remanding the cause without further consideration, a reversal and remandment for that reason alone is not necessarily required, and we may consider and determine the case in such way as seems proper: Cf. BARTON v. BARTON (1943) 318 Ill. App. 68, and give any judgment and make any order which ought to have been given or made: CH. 110 ILL. REV. STATS., 1959, par. 92.

We believe that deceptive intention, like fraud, is never presumed, and that fraud cannot be made out simply by adjectives characterizing alleged acts as fraudulent. There are no specific facts alleged in the petition, and in paragraphs 6 and 7 thereof in particular, that constitute fraud in and of themselves, or any alleged specific facts from which fraud will be necessarily implied. Allegations of fraud merely in the form of the pleader's conclusions are not sufficient in a bill or complaint in the nature of a bill of review or petition under Section 72 of the Civil Practice Act: HUMMEL v. CARDWELL et al. (1948) 335 Ill. App. 337. The plaintiff's petition, though verified by her, is, of course, not evidence, - it is only a pleading, not proof, and its office is merely to point out the alleged errors on which relief is sought: MITCHELL v. EARECKSON (1928) 250 Ill. App. 508; TOPEL v. PERSONAL LOAN AND SAV. BK. (1937) 290 Ill. App. 558.

The plaintiff says that this petition to modify the decree is in the nature of a bill of review and is authorized by Section 72 of the Civil Practice Act, CH. 110 ILL. REV. STATS., 1959, par. 72. So far as presently material that statute provides:

[illegible]

The District Court has been asked to certify the question as to the validity of a bill of review and is authorized to do so.

"(1) Relief from final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished. \* \* \* \* \*

\* \* \* \* \*

(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

\* \* \* \* \*

If that be the nature of this petition to modify the decree, then, it being filed December 20, 1957 and the decree having been entered January 13, 1948, it was filed later than 2 years after the entry of the decree. There is no allegation in the petition that the plaintiff was under any legal disability or duress during any of the time since the decree. Nor is there any allegation that the ground for relief was fraudulently concealed by the defendant during any of that time, or of any alleged facts in support thereof. The plaintiff has evidently been aware for some years of the presently asserted alleged ground for relief, - as long ago as December 14, 1948, less than a year after the decree of divorce, she had filed a previous petition alleging, inter alia, that the \$100.00 monthly alimony was inadequate "and the defendant concealed, by misrepresentation and evasions, the source and amount of his income." There being nothing alleged to toll the limitations period, the present petition, if it be under Section 72, is necessarily barred by the 2 years limitations period therein. Cf. KOBERLEIN et al. v. FIRST NATIONAL BANK etc. et al. (1941)



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(c) The following items are listed as being in the possession of the above named person:

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376 Ill. 450; MORGAN v. PEOPLE (1959) 16 Ill. (2) 374; EPHRAIM v. PEOPLE (1958) 13 Ill. (2) 456; GUTH v. PEOPLE (1949) 402 Ill. 286; PEOPLE v. TOUHY (1947) 397 Ill. 19.

Aside from MASTERS v. SMYTHE et al. (1950) 342 Ill. App. 185, being the prior partition cases between these parties referred to in the petition, the other Illinois cases cited by the plaintiff are: RIDDLE v. RIDDLE (1959) 23 Ill. App. (2) 260, COOCH v. GREEN (1882) 102 Ill. 507, SLOAN v. SLOAN (1882) 102 Ill. 581, and CASWELL v. CASWELL (1886) 24 Ill. App. 548, 120 Ill. 377. RIDDLE v. RIDDLE is an abstract decision of another District of the Appellate Court and does not appear to be in point or applicable here. COOCH v. GREEN was not a bill of review but an original bill by a minor to impeach a partition decree for fraud and error on the face of the decree. SLOAN v. SLOAN held that the bill of review or bill in the nature of a bill of review to set aside a decree of divorce for alleged fraud there concerned was barred by lapse of time. CASWELL v. CASWELL involved a situation and facts wholly dissimilar from anything alleged in the petition in the present case.

We hold, under the circumstances, that the order dismissing the petition to modify the decree was proper, and it will, therefore, be affirmed.

*Wright J. Conners*  
*John J. Edwards*

AFFIRMED.

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PAUL V. WUNDER  
Clerk Appellate Court Second District

No. 11424

Publish Abstract Only

Agenda 8

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, SECOND DIVISION  
OCTOBER TERM, A.D. 1960

G. VINER and J. NEWKIRK, d/b/a )  
ROCKFORD FINANCE CO., NOT INC., )  
Plaintiffs-Appellees, )  
vs. )  
ALSEE WEATHERALL, )  
Defendant-Appellant. )

Appeal from the  
Circuit Court of  
Winnebago County.

28 I.A. 422<sup>2d</sup> 2

WRIGHT -- J.

A judgment was rendered in the Circuit Court of Winnebago County, Illinois, in favor of the plaintiff and against the defendant, upon a complaint and cognovit pursuant to a warrant of attorney contained in a judgment note. The defendant filed a motion supported by an affidavit two weeks thereafter to open the judgment and for leave to plead. This motion was denied by the trial court from which order this appeal is taken. No evidence was presented in this case and the case comes to us on the pleadings. Plaintiff filed a motion to



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PAUL V. WILSON  
U.S. District Court  
St. Louis, Mo.

No. 1122      Published Weekly Only      1914

IN THE

COURT OF THE DISTRICT OF COLUMBIA

SECOND DIVISION, SECOND DIVISION

DOCKET NO. 1122

Appointed from the Circuit Court of Maryland County	{	C. VINE and J. WENTZ, Esqs.
		ROBERT H. HARRIS CO., INC.
		Attorneys-Appellants
		vs.
		AGENTS NEATHELL,
	{	Defendants-Appellees.

2014-11-28

DAVID -- J.

A judgment was rendered in the Circuit Court of Wisconsin County, Illinois, in favor of the plaintiff and against the defendant, upon a complaint and answer entered in a certain of account contained in a judgment under. The defendant filed a motion supported by an affidavit and other material in which the judgment was set aside to be set aside. The motion was denied by the trial court from which appeal is taken. No evidence was presented in this case and the case does not go to the plaintiff. Plaintiff filed a motion to

dismiss the appeal for the reason that no abstract of record was filed in this court. The motion to dismiss the appeal which was taken with the cause is overruled.

Defendant's affidavit in support of his motion stated the following:

"1. That he is the defendant in the above entitled action and if called as a witness would be competent to testify as follows:

2. That on the 1st day of December, 1959, a judgment by confession was entered by this court in the above entitled cause, in favor of the plaintiffs, G. Viner and J. Newkirk d/b/a Rockford Finance Company, not Inc., and against Alsee Weatherall, in the sum of \$1,241.35.

3. That the above judgment was entered on a note given for purchase of a certain automobile by Alsee Weatherall.

4. Affiant states that the judgment entered herein is excessive because said automobile has been repossessed by the plaintiffs herein but they have failed to credit said note with any amount pursuant to repossession although the value of said automobile is equal to or exceeds the balance due to plaintiffs on said note.

5. That by virtue of said repossession the balance now due on the said note is uncertain and cannot be determined until a proper sale is held for said automobile.

6. That the plaintiffs have altered the condition and structure of said automobile to the detriment of the interests of the defendant."

It is the theory of the defendant that his motion and



discharge the vessel for the reason that it was not of the

was filed in 1912 court. The motion to discharge the vessel

which was taken with the court is returned.

Respondent's affidavit in support of his motion stated

the following:

"1. That he is the defendant in the  
above entitled action and is claiming as a  
defendant would be competent to testify as  
follows:

2. That on the 1st day of December,  
1912, a judgment by default was entered  
by this court in the above entitled matter  
in favor of the plaintiff, J. Walter Lee,  
1. Judgment \$100.00 and costs \$10.00,  
not paid, and against James Lee, Jr., in  
the sum of \$110.00.

3. That the above judgment was  
entered on a note given for \$100.00 and  
certain automobile by James Lee, Jr.

4. William Lee, Jr. was the plaintiff  
entered against the defendant James Lee, Jr.  
and the note was given for \$100.00 and  
certain automobile by James Lee, Jr. and  
James Lee, Jr. was the defendant in the  
above entitled matter and the sum of \$110.00  
is due to the plaintiff on said note.

5. That by virtue of said judgment  
the balance now due on said note is  
interest and costs be collected with a  
proper writ as said the said respondent.

6. That the plaintiff have directed the  
execution and return of said writ  
to the sheriff of this county at the  
city of St. Louis.

It is the duty of the respondent to pay the note and

affidavit were timely filed, that his affidavit set out an adequate and proper defense and the trial court erred in failing to open the judgment and granting leave to plead.

Plaintiff urges that defendant's affidavit failed to set forth facts that disclosed a meritorious defense, that no ground for opening the judgment was presented that no verified answer was filed, and the trial court's order denying the motion to open the judgment was correct.

Rule 23 of the Supreme Court, being Section 101.23 of Chapter 110, Illinois Revised Statutes (1959), sets forth the procedure to be followed and the law applicable to opening of judgments by confession. The section provides:

"A motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule 15 for summary judgments, and shall be accompanied by a verified answer which defendant proposes to file. If the motion and affidavit disclose a prima facie defense on the merits to the whole or a part of the plaintiff's demand, the court shall set the motion for hearing."

Supreme Court Rule 15, being Paragraph 101.15 of Chapter 110, Illinois Revised Statutes, defining the form and contents of affidavits, sets forth the following:

"Affidavits in support of and in opposition to a motion for summary judgment or decree, and affidavits under Section 48 of the Civil Practice Act, shall be made on the personal knowledge

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U.S. DEPARTMENT OF AGRICULTURE  
WASHINGTON, D.C.

of the affiants; shall set forth with particularity the facts upon which the claim, counter-claim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used."

Defendant has cited *Willey v. Lawton*, 8 Ill. App. 2d 344, 132 N.E. 2d 34, for the proposition that an uncontradicted petition to vacate a judgment by confession must be taken as true. This is, of course, a correct statement of the law, however, the *Willey* case, *supra*., is not in point for the reasons that the motion and affidavit therein stated facts of defense in detail and the issue of the sufficiency of an affidavit was not before the court. The question now before this court is the sufficiency of defendant's affidavit in support of his motion.

The only question raised by a motion to open a judgment by confession is whether from such motion it appears that the defendant has a defense which entitles him to a trial on the merits. *Lietz v. Ankrom*, 350 Ill. App. 437, 113 N.E. 2d 184. A defense upon the merits is one which depends upon the inherent justice of the defendant's contention, as shown by the substantial facts in the case, as distinguished from one which



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The only question raised by a motion to open a judgment by confession is whether there was motion to open, that the defendant has a defense which entitles him to a trial on the merits. *Leary v. County, 150 Ill. App. 441, 443, 204 Ill. A. 2d 100.*

rests upon technical objections or some collateral matter.

Busse v. Muller, 295 Ill. App. 101, 14 N.E. 2d 669.

A motion to vacate a judgment by confession is directed to the conscience of the court, and will be allowed where a defense upon the merits clearly appears from the affidavits admissible in support of such motion. Brunswick v. Hurley, 131 Ill. App. 235. A defendant seeking to vacate a judgment by confession must allege facts showing clearly that he has a meritorious defense, and the court is not bound to take the mere conclusions of the pleader as true. Freudenthal v. Lipman, 320 Ill. App. 681, 51 N.E. 2d 794. Illinois Supreme Court Rule 15, supra., states that such affidavits shall set forth "with particularity the facts" upon which the defense is based and the affidavits "shall not consist of conclusions but of facts admissible in evidence."

In Paragraph 4 and 5, of his affidavit, defendant stated that the automobile was repossessed and that no credit was given for the value of the automobile and that it is equal to or in excess of the balance due on the note and that the balance due on the note cannot, therefore, be determined until a resale of the automobile. No facts are set forth concerning the value by anyone acquainted with the automobile or competent to so testify. There are no facts alleged as to the model or year of the automobile. The amount of the balance of the note



These were considered objections to some material witness.  
In re: [illegible], 100 U.S. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

is not stated. Defendant's statement that the balance could not be determined until a proper sale of the car was held cannot be considered as a defense but a mere request that there be a sale to determine the credit to be given. There are no facts alleged to indicate in what manner the plaintiff altered the condition and structure of the automobile. There is no assertion herein that defendant did not execute the note in question, that it was not in default, that there was not a balance due and owing, that he was defrauded in the transaction, or any other fact which goes to the merits of the transaction.

A close examination of defendant's affidavit filed in support of his motion to vacate or open up the judgment discloses that it merely contains conclusions and not facts admissible in evidence as required by the foregoing authorities and Illinois Supreme Court Rule 15. There was not presented to the trial court a factual situation which would, in the exercise of its sound legal discretion, warrant the opening of the judgment entered. Therefore, the judgment of the Circuit Court of Winnebago County was correct and it's judgment is affirmed.

J U D G M E N T A F F I R M E D.

*Spivey, J. Concurs.*

CROW, F.J. and SPIVEY, J., Concur

is not stated. Defendant's statement that the witness could not be determined until a proper sale of the land was held cannot be considered as a defense and is not a proper defense. There is no case to determine the credibility of the witness. There are no facts alleged to indicate in what manner the plaintiff altered the condition and structure of the two estates. There is no assertion herein that defendant did not intend the lot in question, that it was not in reality, that there was not a balance due and owing, that the defendant is the true owner, or any other fact which goes to the merits of the transaction.

A close examination of defendant's affidavit which is support of his motion to vacate or open up the judgment does disclose that it merely contains conclusions and not facts ascertainable in evidence as required by the foregoing authorities and Illinois Supreme Court Rule 11. There are no facts stated to the trial court a factual situation which would, in the exercise of its sound legal discretion, warrant the setting of the judgment aside. Therefore, the judgment of the Circuit Court of Adams County was correct and its judgment is affirmed.

IN WITNESS WHEREOF

*John J. Spivey*  
 JOHN J. SPOIVEY, J., CLERK.

FILED

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PAUL V. WUNDER  
Clark Appellate Court Second District

No. 11444

Publish Abstract Only

## Agenda 14

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, SECOND DIVISION  
OCTOBER TERM, A.D. 1960

JOSEPH A. WALLACE,  
Plaintiff-Appellee,  
vs.  
ARTHUR KOPPERDALE and MARIE  
I. KOPPERDALE,  
Defendants-Appellants.

Appeal from  
Circuit Court  
of Kane County.

28 I.A.<sup>2d</sup> 423

WRIGHT -- J.

This is a Habeas Corpus action by Joseph A. Wallace, plaintiff-appellee, before the Circuit Court of Kane County, Illinois, inquiring of Arthur Kopperdale and Marie I. Kopperdale, defendants-appellants, by what authority they restrain the three minor children of said Joseph A. Wallace, namely, Joseph A. Wallace, III, Lynda Marie Wallace and Cindy Lou Wallace, and deny him the custody of said children. The trial court entered an order issuing a Writ of Habeas Corpus to produce in court the three children of the plaintiff, and upon final hearing awarded their custody to the



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U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE  
DIVISION OF INVESTIGATION  
WASHINGTON, D.C.

IN THE  
FEDERAL COURT OF DISTRICT OF COLUMBIA  
SECOND DIVISION, SECOND DIVISION  
JULY TERM, A.D. 1940

JOSEPH A. WALLACE  
vs.  
JAMES K. WALLACE and MARIE  
J. KAPTEKOWSKI,  
Defendants-Appellants.

281A.423

VERDICT -- 1.

This is a habeas corpus action by Joseph A. Wallace, plaintiff-appellee, before the District Court of the District of Columbia, District of Columbia, and Marie J. Kaptekowski, defendant-appellee, by and against their respective attorneys, James K. Wallace and Marie J. Kaptekowski, who were appointed by the court to represent the respective parties. The trial court entered an order granting a writ of habeas corpus to plaintiff-appellee and against the respective attorneys, James K. Wallace and Marie J. Kaptekowski, who were appointed by the court to represent the respective parties. The trial court entered an order granting a writ of habeas corpus to plaintiff-appellee and against the respective attorneys, James K. Wallace and Marie J. Kaptekowski, who were appointed by the court to represent the respective parties.

plaintiff who is the father of the children. This appeal is taken from the order of the trial court, by the defendants who are the maternal grandparents of the children involved.

The plaintiff, Joseph A. Wallace, was married on July 18, 1943, to Betty June Wallace. They lived together until September 25, 1954. Of this marriage, three children were born, Joseph A. Wallace, III, now thirteen years of age, Lynda Marie Wallace, now ten years of age and Cindy Lou Wallace, now five years of age. On September 25, 1954, Betty June Wallace left her husband and children. On April 20, 1956, the plaintiff obtained a decree for divorce from Betty June Wallace in the Circuit Court of Madison County, Illinois. This divorce decree granted the plaintiff, Joseph A. Wallace, the care, custody, control and education of the three minor children, "without any interference on the part of said defendant, Betty June Wallace, until the further order of this court." On September 28, 1958, the plaintiff left his three children with the defendants, Arthur Kopperdale and Marie I. Kopperdale, who reside at Elgin, Illinois. The defendants are the father and mother of Betty June Wallace, the mother of the three children. The plaintiff requested the return of the three children from the defendants about the middle of July, 1959. The defendants refused to return the children and informed the plaintiff that he could not have them. The plaintiff, thereupon, on July 17, 1959, filed a petition for Writ of Habeas Corpus. Defendants filed an



plaintiff was the father of the children. This appeal is taken from the order of the trial court, by the defendant who was the maternal grandparents of the children involved.

The plaintiff, Joseph A. Wallace, was married on July 18, 1945, to Betty Jane Wallace. They lived together until September 25, 1950. Of this marriage, three children were born, Joseph A. Wallace, III, now thirteen years of age, Linda Marie Wallace, now ten years of age and Cindy Lee Wallace, now five years of age. On September 25, 1950, Betty Jane Wallace left her husband and children. On April 20, 1950, the plaintiff obtained a decree of divorce from Betty Jane Wallace in the Circuit Court of Madison County, Illinois. This divorce decree granted the plaintiff, Joseph A. Wallace, the care, custody, control and education of the three minor children, "without any reservation on the part of said defendant, Betty Jane Wallace, until the further order of this court." On September 18, 1950, the plaintiff left his three children with the defendant, Arthur Koppensdale and Marie I. Koppensdale, who reside in Elgin, Illinois. The defendant are the father and mother of Betty Jane Wallace, the mother of the three children. The plaintiff requested the return of the three children from the defendant about the middle of July, 1951. The defendant refused to return the children and informed the plaintiff that he could not have them. The plaintiff, therefore, on July 17, 1951, filed a petition for writ of habeas corpus. Defendant filed an

Answer to the petition wherein they admitted that the plaintiff was awarded the care, custody and control of the three children by a divorce decree entered in the Circuit Court of Madison County, Illinois, on April 20, 1956. The defendants further in their answer alleged certain facts as to the conduct of the plaintiff and stated that it was to the best interest of the three children that they remain in the custody of the defendants.

It is the theory of the defendants that it is to the best interests of the minor children that they remain in the custody of the defendants and that the trial court's finding that the best interests of the children would be best served by restoring their custody to the plaintiff was erroneous and contrary to the manifest weight of the evidence.

It is the position of the plaintiff that by virtue of the divorce decree entered in the Circuit Court of Madison County, Illinois, he was given the exclusive custody of the children and that the divorce decree has never been modified nor altered. Plaintiff further argues that the Circuit Court of Madison County has continuing jurisdiction to modify the decree as to the custody of the children and that the only question before the Circuit Court of Kane County in this proceeding is who has the legal authority to have the care, custody, control and education of the children and by what authority they are being restrained by defendants.

answer to the petition wherein they submitted that the plaintiff was awarded the care, custody and control of the three children by a divorce decree entered in the Circuit Court of Madison County, Illinois, on April 20, 1931. The defendant further in reply answered alleged certain facts as to the custody of the plaintiff and stated that it was to the best interest of the three children that they remain in the custody of the defendant.

It is the theory of the defendant that it is to the best interest of the minor children that they remain in the custody of the defendant and that the trial court's finding that the best interests of the children would be best served by continuing their custody to the plaintiff was erroneous and contrary to the manifest weight of the evidence.

It is the position of the plaintiff that by virtue of the divorce decree entered in the Circuit Court of Madison County, Illinois, he was given the exclusive custody of the children and that the divorce decree has never been modified or annulled. Plaintiff further argues that the Circuit Court of Madison County has continuing jurisdiction to modify the decree as to the custody of the children and that the only question before the Circuit Court of Madison County in this proceeding is who has the legal authority to have the care, custody, control and education of the children and by what authority they are being restricted by defendant.



The defendants have cited to us Winslow v. Lewis, 15 Ill. App. 2d 65, 144 N.E. 2d 782, and People ex rel. Noonan v. Wingate, 376 Ill. 244, 33 N.E. 2d 467, for the proposition that where the custody of a minor child is involved in a habeas corpus proceeding, the best interests and the present and prospective welfare of the child are the primary considerations. We have examined these two cases and find that they are not in point factually. In the Winslow case, supra., both parents were deceased, there had been no decree for divorce fixing custody of the child and the question presented to the court was whether the plaintiff, the legal guardian of the child, was entitled to custody or whether the defendant who was the aunt of the minor child was entitled to custody. This court therein held that the evidence of the trial court indicated that the best interests of the child would be served if she was returned to the guardian of the child's person and estate, for placement with her brother and sister in a home of a married couple who had commenced adoption proceedings for her brother and sister and planned on commencing adoption proceedings for the minor child in question, rather than be left with the unmarried paternal aunt. Likewise, in People ex rel. Noonan v. Wingate, supra., is not in point. In that case, both parents were dead, there was no divorce decree awarding custody of the child and the only issue was whether or not the maternal uncle or the paternal grandmother, who had been appointed by a Massachusetts court as guardian of the person

[illegible]

and estate of the minor, was entitled to custody.

It has been held repeatedly by our Supreme Court that a divorce decree entered by an Illinois Court until modified, is conclusive as between the husband and wife and their representatives as to custody of children. Circumstances, if any exist, which might move the court to modify the custody provision of a decree cannot be considered in Habeas Corpus but should be presented to the court in which the divorce decree disposing of the custody of the child was rendered. *People ex rel. Hanawalt v. Small*, 237 Ill. 169, 86 N.E. 733. It has also recently been held by our Supreme Court that the custody issue should be submitted to the court which entered the divorce decree and that such court has continuing jurisdiction over the custody of children, even after the death of one parent. *Jarrett v. Jarrett*, 415 Ill. 126, 112 N.E. 2d 694.

In the case now before us, the plaintiff, on April 20, 1956, by a decree of the Circuit Court of Madison County, Illinois, was awarded the care, custody, control and education of his three minor children which decree is in full force and effect until modified or altered. The Circuit Court of Madison County, Illinois, has continuing jurisdiction to modify the decree as to the custody of the three children involved and may do so where conditions have changed since the original decree was entered and the best interest of the children will be served. The



and estate of the other, was entitled to custody.

It has been held repeatedly by our highest court that a

divorce cannot be granted by an Illinois court until the parties

consent to the divorce, and the husband and wife are both represented

by counsel, and the court is satisfied that the parties are

competent to make the divorce, and that the divorce is in the

best interests of the parties, and that the divorce is in the

best interests of the parties, and that the divorce is in the

best interests of the parties, and that the divorce is in the

best interests of the parties, and that the divorce is in the

best interests of the parties, and that the divorce is in the

best interests of the parties, and that the divorce is in the

best interests of the parties, and that the divorce is in the

best interests of the parties, and that the divorce is in the

best interests of the parties.

In the case now before us, the husband, on April 30, 1911,

by a decree of the Circuit Court of Adams County, Illinois, was

granted the care, custody, control and education of his two

minor children which decree is in full force and effect until

modified or dissolved. The Circuit Court of Adams County,

Illinois, has continuing jurisdiction to modify the decree in its

entirety or in part, and the husband has not yet so modified

the decree, and the husband has not yet so modified the decree

and the best interests of the children will be served. The

Circuit Court of Kane County, Illinois, had before it in this Habeas Corpus proceeding the sole issue of by what legal authority the defendants restrained the three minor children of the plaintiff and denied to him their custody. The trial court properly found that the defendants had no such authority and was correct in restoring custody of the three children for the reason that he had been awarded the care, custody, control and education of the children by a decree of the Circuit Court of Madison County, Illinois. Having made this determination, it was not necessary nor proper for the trial court to hear evidence as to the present circumstances of the plaintiff, defendants and the mother of the three children or what was for the best interest and welfare of the three children. The proper and correct court to make a determination of these issues is the Circuit Court of Madison County, Illinois.

The order of the Circuit Court of Kane County is affirmed.

ORDER AFFIRMED.

*Crow P.J.*

CROW, *P.J.* and SPIVEY, J., Concur

the fact that the defendant was not present at the trial and that the jury was not sworn in the presence of the defendant, the court held that the trial was void. The court further held that the defendant was entitled to a new trial. The court also held that the defendant was entitled to a new trial because the jury was not sworn in the presence of the defendant.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 01-11-2001 BY 60322 UCBAW

CROW, J. J. and SPIVEY, J. J. CONCUR

28 #5

A

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT.

28 I.A. 424<sup>21</sup>

General No. 10307

Agenda No. 6.

Harlan S. Watson,

Plaintiff-Appellant,

vs.

Civil Service Commission of the City of Springfield, James W. Eckman, Chairman of said Civil Service Commission; Benjamin Rush, and Harold C. Hawkins, Members of said Commission; City of Springfield Police Department; Wallace Olshefsky, Chief of Police; Lester E. Collins, Mayor and Appointing Authority; and City of Springfield, Illinois, a Municipal Corporation,

Defendants-Appellees.

Appeal from the  
Circuit Court of  
Sangamon County.

REYNOLDS, J.

This is an appeal from an order of the Circuit Court of Sangamon County reversing in part and affirming in part the findings and decision of the Civil Service Commission of the City of Springfield, Illinois, which had discharged the appellant Harlan S. Watson from his position as a member of the Police Department of the City of Springfield. Watson filed his suit for administrative



Abstract

3846

281A.424

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10307

General No. 10307

Harlan A. Watson,

Plaintiff-Appellant,

vs.

Appeal from the  
Circuit Court of  
Madison County.

Civil Service Commission of the City of  
Springfield, James L. Coburn, Chairman of  
said Civil Service Commission; Gustav  
Rush, and Harold T. Perkins, Members of  
said Commission; City of Springfield  
Police Department; Alice Glushko, Chief  
of Police; Lester E. Collins, Mayor and  
Appointing Authority; and City of Spring-  
field, Illinois, a Municipal Corporation,

Defendants-Appellees.

REYNOLDS, J.

This is an appeal from an order of the Circuit Court of  
Madison County reversing in part and affirming in part the find-  
ings and decision of the Civil Service Commission of the City of  
Springfield, Illinois, which had reversed the appeal of Harlan  
A. Watson from his position as a member of the Police Department  
of the City of Springfield. Watson filed his suit for administrative

review and the Circuit Court reversed the finding of the Commission that Watson had used abusive and offensive language toward his fellow officers, but sustained the finding that Watson had committed assault and battery upon Lewis Smith and Robert Olshefsky, his fellow officers, and by his conduct interfered with the ability of the officers to properly perform their official duties, in violation of certain rules and regulations of the Springfield Police Department, and sustained the order of dismissal. The reversal of part of the findings of the Civil Service Commission by the Circuit Court is not raised by the appeal, so that the only matter involved in the appeal to this court by Watson is the order and finding of the Commission that he was guilty of assault and battery upon the two officers. At the time of the filing of charges against Watson, charges other than that of abusive language and assault and battery were made, but they were not sustained by the Commission, are not pertinent to this inquiry and will not be considered.

There is considerable dispute in the evidence, but what happened seems to be as follows:- An automobile, containing five young men had stopped at an intersection in Springfield. There is testimony that one of the men in the car used profanity. Lewis



review and the Circuit Court reversed the finding of the Commission that Watson had used abusive and offensive language toward his fellow officers, but sustained the finding that Watson had committed assault and battery upon Lewis Smith and Robert Almaraz, his fellow officers, and by his conduct interfered with the ability of the officers to properly perform their official duties, the violation of certain rules and regulations of the Springfield Police Department, and sustained the order of dismissal. The reversal of part of the findings of the Civil Service Commission by the Circuit Court is not raised by the appeal, so that the only matter involved in the appeal to this Court by Watson is the order and finding of the Commission that he was guilty of assault and battery upon the two officers. At the time of the filing of charges against Watson, charges other than that of abusive language and assault and battery were made, but they were not sustained by the Commission, are not pertinent to this finding and will not be considered.

There is a considerable dispute in the evidence, but what happened seems to be as follows: An automobile, containing five young men had stopped at an intersection in Springfield. There is testimony that one of the men in the car used profanity. Lewis

Smith and Robert Olshefsky, police officers of the City of Springfield, heard the profanity and went up to the car. They were not in uniform but there is evidence that they showed their badges. The officers ordered the men out of the car, searched them but found nothing in violation of the law and then told the men to get out of town. Instead of getting out of town, three of the men in the car went to police headquarters and reported the incident. While leaving police headquarters they again encountered Smith and Olshefsky and were ordered into the police station. Two of them went in without further order, but the third man, Howell, did not go in as requested. The officers testified he refused, but he denies that he refused to go. The officers then took hold of him and started marching him into the headquarters. There is some dispute as to the manner of their holding Howell, some witnesses claiming a hammer-lock on his arm but the officers contending that they had hold of his arms only, and were propelling him toward the Detective Bureau room. Before reaching that room the two officers were interfered with by Watson. The exact means and acts of interference are disputed. Watson does not deny that he laid hands on the two officers but claims that he merely put his hands on their shoulders and told them "they were not in

Smith and Edward O'Sullivan, police officers of the City of  
Newburgh, heard the complaint and went up to the room. They  
were not in uniform but they had evidence that they were police  
officers. The officers ordered the removal of the man, told the  
man that nothing is violated at the time and told the  
man to get out of there. Instead of getting out of there, the man  
the man in the car sent to police headquarters and reported the  
incident. While leaving police headquarters they were confronted  
Smith and O'Sullivan and were ordered into the police station.  
Two of them went in without further protest, but the third man,  
Hosely, did not go in as requested. The officers took him  
outward, but he denied that he wanted to go. The officers then  
took hold of him and started pushing him into the back seat.  
There is some dispute as to the manner of their holding Hosely,  
some witnesses claiming a hammer-locked on his arm and the others  
contending that they had hold of his arm only, and were struggling  
him toward the Detective House room. Before reaching that room  
the two officers were interrupted with by Hosely. The man came  
and told of interference from Hosely. Hosely then told them  
that he told Hosely that the two officers had taken him to Hosely  
out his hands on their shoulders and told them "they were not in

Mississippi, you don't treat boys like that here." Watson claimed that the two officers then released Howell and Howell went into the room. The officers' versions of the occurrence are entirely different. Olshefsky testified that he was struck on the arm by Watson and that Watson had his arm around the neck of Smith. Smith said Watson knocked Olshefsky against the wall and jumped on his (Smith's) back with his arm around his neck. Policeman Ernest Dodson, was there and corroborated the statement that Watson shoved or knocked Olshefsky against the wall. He didn't see whether Watson had hold of Smith because another officer was blocking his view. Policeman Robert Graves was also present and saw Watson come up behind Olshefsky and Smith, grab Smith and pull him back and saw Olshefsky go against the wall. He then saw Watson go between the two officers and take Howell into the Detective Bureau. He stated that when Watson went between Smith and Olshefsky, that Olshefsky was either knocked or pushed against the wall by Watson. By reason of this occurrence, Watson was suspended by the Chief of Police, and charges were filed by the Mayor of Springfield, charging Watson physically assaulted and committed a battery upon the persons and bodies of Detectives Lewis Smith and Robert Olshefsky, used abusive and offensive language toward them while



Mississippi, you don't treat boys like that here." Watson stated  
that the two officers then released Howell and Howell went into  
the room. The officers' versions of the occurrence are entirely  
different. Olshetky testified that he was sitting on the sofa  
by Watson and that Watson had his arm around the neck of Smith.  
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the persons and bodies of Detectives Lewis Smith and Robert  
Olshetky, used abusive and offensive language toward them while

they were in the performance of their duties, and that the unlawful conduct of Watson seriously interfered with the ability of Smith and Olshefsky to properly perform their official duties.

The appellant Watson raises a number of matters as grounds for reversal. A number of these relate to procedural and technical matters in the proceedings against the appellant before the Commission. It must be recognized that the members of these administrative agencies are usually citizens without legal experience or training. The legislature recognizing this, made provision that technical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the trial court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him. Chapter 110, Section 275 (2) Illinois Revised Statutes. Our courts have likewise adopted this rule. Schwartz v. Civil Service Commission, 1 Ill. App. 2d 522. We do not believe that the decision of the Civil Service Commission to not disqualify its chairman whether with or without notice to the appellant or his attorneys, the investigation of the witness Huff and his background, or the fact that certain written statements



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It must be recognized that the standard of review is not  
whether the court was usually efficient without legal assistance or testimony.  
The judicial review is not a review of the merits of the decision.  
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and his background, or the fact that certain written statements

were in the files of the commission before the hearing, in any way prejudiced the rights of the plaintiff Watson, or resulted in substantial injustice to him. Likewise, the claim that the findings of the Commission did not include findings of fact to support such decision is technical and procedural and we do not find it such as to warrant reversal. The findings and the decision do recite sufficient facts to fully apprise Watson of the charges and findings and we do not believe his rights were prejudiced in any way by the form of the findings and order.

Another ground urged by the appellant is that the Circuit Court should have remanded the cause to the administrative agency for a reconsideration of the penalty, since the Circuit Court reversed some of the findings of the administrative agency. A California case is cited, but we find no Illinois authority for this position. If, the findings reversed by the Circuit Court affected the ultimate decision of the Civil Service Commission, there might be some merit to this contention, but if the finding sustained is sufficient to warrant the penalty imposed, there would be no point in remanding the matter to the administrative agency for reconsideration. The Circuit Court has the power to remand (Chapter 110, Section 275, Illinois Revised Statutes) but

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remand (Chapter 110, Section 275, Illinois Revised Statutes) and

this power is not mandatory but discretionary.

This leaves the real point at issue, namely, was the appellant guilty of an assault upon his two fellow officers, Smith and Olshefsky? The Civil Service Commission of the City of Springfield found him guilty of assault and battery upon Smith and Olshefsky and obstructing or endeavoring to obstruct or hinder these two officers in the discharge of their duties as such officers. Finding him guilty of these charges, the Commission ordered his discharge as a police officer. An examination of the record shows that there was competent evidence of such assault adduced before the Commission. We cannot say that findings of the Civil Service Commission were not supported by the evidence or that they were against the manifest weight of the evidence. Under the authority of many cases on this point, the reviewing court has no right to substitute its judgment for that of the administrative agency, where the findings of the administrative agency is supported by competent evidence and is not against the manifest weight of the evidence. Oswald v. Civil Service Com. 406 Ill. 506, 511; Nolting v. Civil Service Commission, 7 Ill. App. 2d 147, 163; Martin v. Civil Service Commission, 7 Ill. App. 2d 128, 138; Fenyes v. State Retirement System, 17 Ill. 2d 106, 111. Under the Administrative Review Act, the



that he is not a doctor and doctor.

This leaves the real point at issue, namely, was the defendant

guilty of an assault upon his two fellow officers, Smith and

Glavin? The Civil Service Commission of the City of New York

found him guilty of assault and battery upon Smith and Glavin

and obstructing or endeavoring to obstruct an officer from law

officers in the discharge of their duties as such officers. The

and the guilt of these charges, the Commission ordered his removal

as a police officer. An examination of the record shows that there

was competent evidence of each assault against the Commission

and we cannot say that findings of the Civil Service Commission

were not supported by the evidence or that they were against the

manifest weight of the evidence. Under the authority of many

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its judgment for that of the administrative agency, when the latter

finds of the administrative agency is supported by competent evidence

and is not against the manifest weight of the evidence. Quinn v.

Civil Service Comm., 102 Ill. 2d, 101; Smith v. Civil Service

Commission, 7 Ill. App. 2d 14, 13; Smith v. Civil Service

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Commission, 17 Ill. 2d 106, 111. Under the administrative review act, 1907,

findings of the administrative agency on questions of fact are prima facie correct. They may be reviewed to determine if they are supported by the evidence, but they can be set aside only if against the manifest weight of the evidence. Fenyes v. State Retirement System, 17 Ill. 2d 106; Kellogg Switchboard and Supply Corp. v. Department of Revenue, 14 Ill. 2d 434; Logan v. Civil Service Com. 3 Ill. 2d 81; Drezner v. Civil Service Com. 398 Ill. 219. In this case there is evidence by four police officers, Smith, Olshefsky, Graves and Dodson that Watson either shoved or knocked Olshefsky against the wall, jumped on the back of Smith with his arm about his neck, and took charge of Howell himself and marched him into the detective bureau room. Watson does not deny putting his hands upon the officers but calls it "touching them". He claims he only laid his hand on the shoulder of the officers, and this is supported by the testimony of Millard Brown and Arthur Howell. Howell testified Watson "grabbed the officers by the shoulders". Later he stated that Watson "put his hand on each of their shoulders." From this state of the evidence this court cannot say that the finding of the Commission that an assault was committed was not supported by the evidence, nor can we say that such finding is against the manifest weight of the



finding of the administrative agency or question of fact are  
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 are supported by the evidence, but they can be set aside only  
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 officers, Smith, Glazovsky, Brown and others that when either  
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 this court cannot say that the finding of the Commission that an  
 assault was committed was not supported by the evidence, nor can  
 we say that such finding is against the manifest weight of the

evidence. A question of fact was presented and the finding of the Commission on such question of fact is prima facie correct. The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

CARROLL, P.J. and ROETH, J., concur.

... a question of fact was presented and the finding  
of the Commission on each question of fact is final  
correct. The judgment of the Circuit Court will be affirmed.  
Judgment affirmed.

CARROLL, P.J. and ROWEN, J., concur.

28 #5

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48139

STEPHANIE ZERHOOT,	)	APPEAL FROM
Plaintiff-Appellee,	)	
vs.	)	SUPERIOR COURT
	)	
CHARLES ZERHOOT,	)	COOK COUNTY
Defendant-Appellant.)	)	28 I.A. <sup>2d</sup> 424 <sup>2</sup>

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a divorce action with decree in favor of the wife. The husband, defendant, has appealed.

The parties were married in April, 1948, a divorce in her favor was entered in January, 1953 and she remarried defendant in November, 1953. On July 25, 1958, plaintiff filed her complaint for the second divorce alleging extreme and repeated cruelty. August 11, 1959 in her amended complaint she alleged acts of cruelty in 1958 on April 15, May 3, May 26 and August 19th. Plaintiff alleged that defendant left her July 3, 1958.

The instant divorce decree entered March 30, 1960 found that defendant had been guilty of extreme and repeated cruelty in 1958 on April 15, May 3, May 16, May 26 and August 19th. Plaintiff was awarded the divorce, custody of the only child, alimony, child support and her attorney's fees.

The question is whether the evidence supports the decree. A preliminary question is whether the trial court erred in admitting into evidence the deposition of plaintiff's ailing mother.

Defendant complains that the deposition did not meet the statutory requirements because he received no notice and no



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copy of motion for deposition, that there were no exceptional circumstances making it desirable in justice to use the deposition and that no evidence was offered on the deponent's condition at the time of trial. These points were waived because defendant's attorney was present when the deposition was taken and there was no objection of any kind made to the deposition when it was introduced at the trial.

Defendant relies on Tesar v. Tesar, 13 Ill. App.2d 478 (1957); Coolidge v. Coolidge, 4 Ill. App.2d 205 (1955) and Jackson v. Jackson, 294 Ill. App. 552 (1938). In the Tesar case this court decided extreme and repeated cruelty had not been shown. The evidence of one alleged act did not measure up to the allegation and there was no corroboration of the second alleged act. In the Coolidge case the three acts of cruelty were wholly uncorroborated, a potential corroborating witness was not called, and two of the acts occurred after the wife had quit the family home. Also, it appears that two of the alleged acts arose from "tussles growing out of disputes". In the Jackson case the evidence in support of the allegations was weak and the wife contradicted herself in testimony.

Defendant also relies on Whitlock v. Whitlock, 268 Ill. 218 (1915). The court said there was "some corroboration as to one of the alleged acts," but that the rest of the testimony was that of the person making the charges. The court then said that evidence to support a decree for extreme and repeated cruelty must be of "such acts as would constitute sufficient





3.

cause for divorce. . .besides the evidence of the party. . .who makes such charges, where such acts are denied." 268 Ill. at 228.

The plaintiff testified that on May 16th her husband "pushed and shoved me into mother's room and struck me in the head and body, and pushed me with great force, except for a chair, I would have been thrown to the floor. My daughter was in the room and saw the act." She said her mother saw it also. Her mother testified that defendant "slapped her, and he pushed her in my bedroom ". Plaintiff testified that on May 26th defendant pushed her into her mother's room and "hit me in the head, face and body, and twisted my arm and said he would break every bone in my body". Her mother testified that she saw the defendant push plaintiff in the face and "he got her hand and he pushed her hand like that. . . .He squeezed it, and I thought now he breaks her hand . . . .He twisted it and he says I will break every bone in your body."

Plaintiff also testified that on April 15, 1958 her husband kicked her; that on May 18th he punched her "in the face and body." And that during the night of August 18th-19th he "threw me on the floor, struck me in the stomach, and then stepped and stomped on my head, feet and hands".

The nine year old child of the parties testified as a court's witness that she never saw her father strike her mother but also testified that she saw her father push and pull her mother into "grandmother's bedroom." She then said that she told plaintiff's lawyer at his office in the morning that her father struck her



4.

mother two or three times, and she testified on re-cross that "I am telling the truth here". Then on redirect, "I was telling the truth in your office".

We think that the Chancellor having in mind the previous divorce in plaintiff's favor, her remarriage to defendant, seeing the witnesses and hearing their testimony, could have found on this testimony that plaintiff was entitled to a divorce on the ground of extreme and repeated cruelty. We think this testimony would satisfy the requirements of the various rules in the cases discussed hereinabove.

Defendant implies that the acts testified to here condoned plaintiff's admitted residing in the family home until July 3, 1958. Condonation was neither pleaded nor testified to. There is no basis for the implication. Lipe v. Lipe, 327 Ill. 39, 42 (1927).

The decree allowed \$30.00 per week for plaintiff and the child and \$750.00 attorney's fees. The record discloses that defendant had been paying \$65.00 per week temporary support and alimony for his wife and child and for utilities and mortgage payment on the family home. Defendant has his own plumbing and heating business and testified that in addition to the \$65.00 per week already noted, he paid "all other expenses." Defendant, however, testified "in 1958 he earned \$2,290.00 and in 1959 earned less than \$1,500.00". Here again the Chancellor was in a better position than we are to determine what was a fair allowance in view of the uncontroverted testimony of the needs of plaintiff and her



5.

daughter. The Chancellor apparently was not persuaded that defendant told the whole story about his income. The record shows that plaintiff's attorney devoted 55 hours to the proceeding. An allowance of \$750.00 was not excessive.

We have considered the points necessary for our decision. The decree is affirmed.

AFFIRMED.

BURMAN and MURPHY, JJ. Concur.

ABSTRACT ONLY.





2876



NO. 60-0-4

In The

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1960

28 I.A.<sup>2d</sup> 425

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ILLINOIS TERMINAL RAILROAD COMPANY,	)	
a Corporation,		
	Plaintiff-Appellee,	)
-vs. -	)	Appeal from the
GULF, MOBILE & OHIO RAILROAD COMPANY,	)	Circuit Court of
a Corporation,		
	Defendant-Appellant,	) St. Clair County,
and	)	Illinois.
EE-JAY MOTOR TRANSPORTS, INC.,	)	
a Corporation,		
	Defendant-Appellee.	)

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Honorable Harold O. Farmer, Judge Presiding.

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SCHEINEMAN, J.

This is an action arising out of a train and truck collision in which a building of the Illinois Terminal Railroad was damaged as well as the train and the truck. The Illinois Terminal sued both the Gulf, Mobile & Ohio Railroad and the Ee-Jay Motor Transports, Inc., and each of the latter counter-claimed against the other. In addition, Ee-Jay Motor counter-claimed against plaintiff.

The jury found in favor of Illinois Terminal against



Gulf, Mobile and in favor of Ee-Jay Motor Transports against Gulf, Mobile. On the other causes, the jury found in favor of Illinois Terminal on the counter-claim against it by Ee-Jay Motor, and in favor of Ee-Jay Motor on the counter-claim against it by Gulf, Mobile, and on the complaint against it by Illinois Terminal. Judgments were entered on the verdicts and Gulf, Mobile has appealed.

Gulf, Mobile contends that Ee-Jay Motor was guilty of contributory negligence as a matter of law, and that as between these parties the action should have been resolved by a judgment in its favor notwithstanding the verdict. In addition, Gulf, Mobile contends it is entitled to a new trial on the complaint of Illinois Terminal since the verdict and judgment against it in the trial court did not take into consideration the contributory negligence of Ee-Jay Motor Transport.

The following facts are not disputed: The occurrence was on a clear day shortly after noon at the intersection of a well traveled road and a four track railroad crossing in Wood River. The tractor-trailer unit of Ee-Jay was about 41 feet long. The railroad tracks were 20 to 25 feet apart. After proceeding across the first three tracks, the truck was hit by the train, about 8 feet behind the cab, the train coming on the fourth track from the truck's right side. The road and the track were heavily traveled at this intersection and a flagman normally was stationed between the third and fourth tracks to warn of approaching trains by using a stop sign and a whistle. The flagman was the agent of Gulf, Mobile, but at the time of this accident he was in his shanty and not present in his customary position to warn approaching automobile traffic.



Photographs in evidence disclose that there is a line of telephone poles along the tracks, but that from any one of the tracks there is an unobstructed view to the far distance with the tracks running in a straight line. The driver was familiar with the intersection, having crossed it two or three times a day all summer. The train normally proceeded through this intersection at 55 to 60 miles per hour. On this occasion it was going 75 miles per hour until the emergency brakes were set about 150 feet from the crossing, which reduced its speed to 55 at the intersection. About one block farther along there was a speed restriction of 45 miles per hour.

The engineer testified that he sounded two long, a short and a long blast on his horn at the first whistle post for this crossing, but the distance from the crossing was not stated. The next warning horn to which he testified as at the time he put the locomotive into emergency about 150 feet from the crossing, which sound the truck driver heard just as he started to cross the fourth track.

In our opinion the evidence was clearly sufficient to support a jury verdict in favor of Terminal Railroad, the original plaintiff, against Gulf, Mobile and no real contention to the contrary has been made on this appeal by the railroad.

As to Ee-Jay Motor, before it can be held contributory negligent as a matter of law, and a judgment notwithstanding the verdict awarded to appellant, the court must consider all of the evidence, together with all reasonable inferences from it in its aspect most favorable to Ee-Jay Motor, and find that there is a total failure or lack of evidence to prove that it was in the





exercise of due care. *Humbert v. Lowden*, 385 Ill. 437.

It is well settled that railroad crossings are dangerous places, and that in crossing them a person must approach the track with a degree of care proportionate to the known danger. The law requires that the traveler make diligent use of his senses of sight and hearing and exercise care commensurate with the danger to be anticipated. *Tucker v. N.Y.C. & St. L. R.R. Co.*, 12 Ill. 2d 532; *Moudy v. N.Y.C. & St. L. R.R. Co.*, 385 Ill. 446.

The law does not tolerate the absurdity of permitting a plaintiff to say he looked and did not see the approaching train, when had he looked he would have seen it. *Dee v. City of Peru*, 343 Ill. 36; *Greenwald v. B. & O. R.R. Co.*, 332 Ill. 627; *Holt v. I. C. R.R. Co.*, 318 Ill. App. 436. However, there may be facts such as obstructions to view or distractions that might mislead a plaintiff without his fault and excuse a failure to look and listen. *Gills v. N.Y.C. & St. L. R.R. Co.* 342 Ill. 455; *C. & A. R.R. Co. v. Pearson*, 185 Ill. 386.

As previously noted the photographs admitted in evidence show a clear and unobstructed view of all four of the tracks from the various positions in crossing them. The driver of Ee-Jay Motor truck testified he stopped about eight feet before reaching the first track, looked both right and left and saw no train approaching. He said he could not see "too far" to the right because of a line of telephone poles with cross arms located between the third and fourth tracks. He then proceeded to cross the tracks at five miles per hour and was capable of stopping his vehicle at any time in a distance of five feet. When crossing between the second and third set of



tracks, he again looked both right and left and saw no train. Here he could see one-half or one-fourth of a mile to the right as the poles did not interfere too much. As he crossed the third set of tracks he looked once more to the right and saw no train. At this point he says his vision was somewhat obscured by the poles, but he could still see between one-half and one-fourth of a mile to his right. He said the distance between the third and fourth tracks was 25 feet, but in traveling that distance he looked only to his left, and did not look to his right again until his front wheels were on the track. Then for the first time, he saw and heard the train about 75 yards away. He admitted that, in the last 10 feet of his crossing, there was nothing to obstruct his vision to the right, he could have seen the train and stopped in five feet. When he did see it, he attempted to accelerate his truck to cross the track ahead of the train. The resulting collision threw the trailer through the air into the Illinois Terminal building which was located about 60 feet down the tracks.

From his own testimony it is apparent that he had, at all times in crossing the several tracks, a sufficiently unobstructed view to see a quarter to a half mile to his right. So that after he crossed the first track the approaching train must necessarily have been within his vision the rest of the time that he was crossing.

It is contended for Ee-Jay Motor that the court should consider other matters besides the question of visibility and reference is made to the fact that the flagman was not at his customary post, and that the train did not sound a continuous warning, and the high rate of speed of the train, and, finally, that it would not have been



safe to stop his truck while straddling two tracks at a heavily traveled railroad crossing.

The rule is that, although the fact that a signal system is not operating is an indication to the traveler that it is safe to cross, nevertheless, he is not thereby relieved of the duty of using reasonable care for his own safety. Where a traveler has an unobstructed view of a dangerous railway crossing, he is not justified in failing to look, or, on looking, failing to see an approaching train, merely acting in reliance upon an assumption that no train is approaching. *Grubb v. Illinois Terminal*, 366 Ill. 330. *Applegate v. C. & N.W. R.R. Co.*, 334 Ill. App. 141; *Sprague v. N.Y.C. & St. L. R.R. Co.*, 20 Ill. App. 2d 480. Nor can one rely upon the assumption that there will not be a violation of a statutory requirement such as operating signals or ringing bells. *Greenwald v. B. & O. R.R. Co.*, 332 Ill. 627. *Urban v. Pere Marquette Co.*, 266 Ill. App. 152. The absence of the flagman, the matter of sounding warnings, and the rate of speed of the train bear upon the question of the railroad's negligence, but do not excuse the lack of reasonable care on the part of the Ee-Jay Motor Transports company.

There is no merit in the contention that this truck driver should be excused for driving in front of a fast train because it would be dangerous to stop on other tracks where no train was approaching.

Since the railroad crossing was in plain sight and the driver was aware of the dangerous situation, and since it was





possible to see the train approaching during the entire time that this driver proceeded from the first track to the fourth track, and he could have stopped at any time within five feet, we arrive at the conclusion that he was negligent as a matter of law in failing to see the train that was necessarily visible if he had looked.

It is necessary then to consider whether this cause must be remanded with directions to enter judgment in accordance with this opinion as to Ee-Jay Motor Transports and at the same time order a new trial as to the judgment in favor of Terminal Railroad. The common law rule upon this subject, which was formerly the law of this state, sometimes regarded a judgment as a unit. Under that doctrine a judgment against two or more defendants, and in contract or tort, was indivisible and could neither be vacated by a trial court nor reversed by a reviewing court as to one defendant alone, even though it was not erroneous as to the other. *Seymour v. Richardson Fueling Company*, 205 Ill. 77; *South Side Elevated Railroad Co. v. Nesvig*, 214 Ill. 463.

This arbitrary common law rule is no longer the law in this state. The Illinois Supreme Court considered the rule at length and abolished it in the case of *Chmulewski v. Marich*, 2 Ill. 2d 568. The following are direct quotations of parts of the opinion in that case:

"The arbitrary and inflexible character of the common-law unit-judgment rule is, of course, at odds with the more discerning treatment otherwise accorded joint tort-feasors.



Every joint tortfeasor is liable for all damages to which his conduct has contributed, and it is no defense that these damages would not have occurred without the concurring misconduct of another person. (Siegel, Cooper & Co. v. Trcka, 218 Ill. 559). As a result, the plaintiff need not join all the tortfeasors as defendants (Lasher v. Littell, 202 Ill. 551; Village of Carterville v. Cook, 129 Ill. 152), and if he does sue more than one in the same action, he may, after a favorable verdict against all, dismiss the action as to one and take judgment against the others alone, (Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249). The jury may properly return a verdict in favor of one tortfeasor and against another. (Republic Iron and Steel Co. v. Lee, 227 Ill. 246, 254) or the court may direct a verdict in favor of one co-defendant and let the case against the other go to the jury, which may thereupon return a verdict against the latter, (Humason v. Michigan Central Railroad Co., 259 Ill. 462; Fowler v. Chicago Railways Co., 285 Ill. 196). If a verdict is returned against two defendants, the court may grant a new trial as to one of them only, (Illinois Central Railroad Co. v. Foulks, 191 Ill. 57). Even under the Practice Act of 1906, this court, in Livak v. Chicago and Erie Railroad Co., 299 Ill. 218, 226, had pointed out that the contrary rule, followed in many states, 'is proper and more in harmony with justice and economy in the disposition of law suits, ' although in that case a majority of the court nevertheless adhered to the common-law rule."

The opinion proceeds to analyze various cases pertaining to the so-called unit rule, and discarded the rule.



If a single judgment against two defendants may be severed so that it is affirmed as to one and reversed as to the other, then it must be even more reasonable to treat separately judgments for two different plaintiffs against the same defendant, although they resulted from one trial.

Applying the foregoing reasoning to the case now before the court it is our opinion that it is entirely proper to reverse the judgment in favor of Ee-Jay Motor Transports, Inc., without ordering a new trial on the case of Illinois Terminal Railroad Company against Gulf, Mobile & Ohio Railroad Company. In behalf of the latter it is argued that if the jury had been instructed to find it not guilty on the counter-claim of Ee-Jay Motor, then the jury would have recognized that Ee-Jay Motor had been negligent and they might have found that such negligence was the only proximate cause of the accident.

This supposition is in the realm of pure speculation. It is our view of the case that the verdict in favor of Illinois Terminal Railroad v. Gulf, Mobile & Ohio Railroad was proper and fully justified by the evidence and that the defendant is not relieved from the consequences of its negligence merely because somebody else was also guilty of negligence which contributed to the result. As noted in the quotation above, the original plaintiff need not have joined all the tortfeasors as defendants. It could have sued Gulf, Mobile alone and could have at any time before judgment dismissed Ee-Jay Motor Transports as to Illinois Terminal's complaint. There is no apparent reason why Illinois





Terminal's rights should be more restricted in the reviewing court than it was in the trial court. We deem it proper to affirm Illinois Terminal's judgment and reverse the judgment for Ee-Jay Motor.

The judgment in favor of Illinois Terminal Railroad Company against Gulf, Mobile & Ohio Railroad Company is affirmed and the judgment in favor of Ee-Jay Motor Transports, Inc., vs. Gulf, Mobile & Ohio Railroad Company is reversed.

Affirmed in part and reversed in part.

Culbertson, P. J. and Hoffman, J., concur.

Publish Abstract only.

FILED  
JAN 18 1961  
*James P. McLaughlin*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



28th

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

A

General No. 10317

Agenda No. 14

Goaldia Ward, Arleigh J. Spessard,  
Theresa Drzal, David E. Ward, Ray B.  
Ward and Treva W. Anderson,

Plaintiffs-Appellees,

vs.

City of Georgetown, Illinois, a Municipal  
Corporation,

Defendant-Appellant.

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: Appeal from the  
: Circuit Court of  
: Vermilion County  
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28 I.A.<sup>2d</sup> 447

CARROLL, Presiding Justice.

This is an action to recover damages to plaintiffs' real estate alleged to have been caused by the defendant corporation in raising the height of its dam across the Little Vermilion River in Vermilion County, Illinois.

Substantially the complaint alleges that the Little Vermilion River flows northerly through certain land of plaintiffs; that in connection with the operation of a municipal waterworks near its corporate limits, the defendant maintains a dam across said River; that plaintiffs' land lies approximately 3 miles up the River and west of the dam; that for many years prior to March 31, 1956, the height of said dam was such as not to impede the flow of the water in high water periods as it ran through plaintiffs' land;

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10317

General No. 10

Appeal from the  
Circuit Court of  
Vermilion County

:  
: Plaintiff-Appellees,  
: vs.  
: Defendant-Appellant.  
: City of Georgetown, Illinois, a Municipal  
: Corporation,  
: and Lewis A. Anderson,  
: Thomas L. Neal, David A. Ward, Ray B.  
: Collins and Arthur J. Spassand,

CARROLL, Presiding Justice.

This is an action to recover damages to plaintiffs' real estate alleged to have been caused by the defendant corporation in raising the height of its dam across the Little Vermilion River in Vermilion County, Illinois.

Substantially the complaint alleges that the Little Vermilion River flows northerly through certain lands of plaintiffs; that in connection with the operation of a municipal waterworks near its corporate limits, the defendant maintains a dam across said River; that plaintiffs' land lies approximately 3 miles up the River and west of the dam; that for many years prior to March 31, 1905, the height of said dam was such as not to impede the flow of the water in high water periods as it ran through plaintiffs' land;

that during said period, a high bank on the northwest side of the River separated the River and plaintiffs' adjoining land and as a result in flood times plaintiffs' land never had but a small amount of backwater; that on or about March 31, 1956, defendant raised the dam's height 5 feet; that as a result thereof the water level of the River was raised and in the Spring of 1957 and 1958 it rose to such a height as to break through its bank and flow through plaintiffs' land; that the current of the overflow washed out the corn crop growing on plaintiffs' land in the years 1957 and 1958 resulting in a crop loss amount<sup>ing</sup> to 1000 bushels of corn; that as a further result of said overflowing an 8-1/3 acre tract of plaintiffs' land was divested of its top soil, thus rendering it unfit for crop production in the future. Damages prayed were \$1500 for loss of crops and \$3000 for the permanent injury to the land.

Defendant admitted raising the height of the dam but denied that such construction caused the damages claimed in the complaint. The issues were submitted to a jury which returned a verdict for plaintiffs in the amount of \$2750. The trial court denied defendant's alternative post trial motion for judgment notwithstanding the verdict or a new trial and entered judgment on the verdict and defendant has appealed.

As grounds for reversal it is urged that the trial court erred in refusing to direct a verdict for defendant; that it should have either entered judgment for defendant notwithstanding the verdict or granted a new trial; that the jury were given certain erroneous instructions and that the trial court erred in ruling on the admission of certain evidence.



that during said period, a high bank on the northwest side of the river separated the river and plaintiff's adjoining land and as a result in flood times plaintiff's land never had but a small amount of water; that on or about March 31, 1934, defendant raised the dam's height a foot; that as a result thereof the water level of the river was raised and in the spring of 1937 and 1938 it rose to such a height as to break through its bank and flow through plaintiff's land; that the current of the overflow washed out the corn crop growing on plaintiff's land in the years 1937 and 1938 resulting in a crop loss amounting to 1000 bushels of corn; that as a further result of said overflowing on 9-1/2 acre tract of plaintiff's land was destroyed of its top soil, thus rendering it unfit for crop production in the future. Damages proved were \$100 for loss of crops and \$200 for the permanent injury to the land.

Defendant admitted raising the height of the dam but denied that such construction caused the damage claimed in the complaint. The issues were submitted to a jury which returned a verdict for plaintiff in the amount of \$2750. The trial court could not find alternative post trial motion for judgment notwithstanding the verdict or a new trial and entered judgment on the verdict and defendant has appealed.

As grounds for reversal it is urged that the trial court erred in refusing to direct a verdict for defendant; that it should have either entered judgment for defendant notwithstanding the verdict or granted a new trial; that the jury were given certain erroneous instructions and that the trial court erred in ruling on the admission of certain evidence.

It is plaintiffs' theory that the 5 foot increase in the height of defendant's dam obstructed the flow of water in the Little Vermilion River so that in times of high waters the flood waters overflowed the bank separating plaintiffs' land from the River thereby cutting a channel across said land, carrying away the top soil, exposing rocks and thus rendering it worthless. Defendant contends that the evidence fails to establish a causal connection between the raising of its dam and the alleged injury to plaintiffs' land.

Ralph Dowers, witness for plaintiffs, testified that in 1957 he owned 20 acres adjoining and southeast of plaintiffs' tract; that his land was  $2\frac{1}{2}$  to 3 miles above the dam and on both sides of the River; that he had a ford across the River one quarter of a mile from plaintiffs' land; that prior to the time defendant raised its dam the average summer depth of the River at his ford was 6 to 8 inches; that after the dam was raised in 1956 the average depth of the water at the ford was 3 to 4 feet; that there was no sudden drop between his land and that of plaintiffs and that prior to the dam construction the water at that point flowed very slowly; that he had helped to farm the plaintiffs' land in 1950 raising about 60 to 65 bushels per acre on the  $8\text{-}\frac{1}{3}$  acre piece; that he had no difficulty in farming it; that it was not a river bed; and he knew of no flood damage to it prior to 1956.

David Ward, one of the plaintiffs, who was 42 years of age, testified that he had been familiar with the land all his life; that he had seen his father help his grandfather farm it; that during his youth he helped his father farm it and had farmed

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that the evidence fails to establish a causal connection between the  
raising of its dam and the alleged injury to plaintiff's land.  
Ralph Dewart, witness for plaintiff, testified that in  
1907 he owned 20 acres adjoining the southeast of plaintiff's tract  
that his land was 2 1/2 to 3 miles above the dam and on both sides of  
the river; that he had a fence across the river and deposit of a pile  
from plaintiff's land; that prior to the time defendant raised its  
dam the average summer height of the river at his farm was 1 foot  
higher; that after the dam was raised in 1900 the average height of  
the water at his farm was 2 to 3 feet; that there was no connection  
between his land and that of plaintiff's and that prior to the  
dam construction the water at that point flowed very slowly; that  
he had helped to raise the plaintiff's dam in 1898 and in 1900  
to 15 inches for water on the 1/2 acre piece; that he had no  
difficulty in turning it; that it was not a river bed; and that there  
of no flood came to it prior to 1900.

David Ward, one of the plaintiffs, who was 60 years of  
age, testified that he had been familiar with the land all his  
life; that he had seen the father build his present dam; and  
that during his youth he helped his father raise it and had learned



it himself since 1953; that during all the years prior to 1956 no water came over the river bank although some flooding of the land by surface water from the higher ground had occurred; that during the time witness farmed the tract he raised 500 bushels of corn on it; that in July of 1957 the River rose, came over its bank and flooded through the 8-1/3 acres, destroying most of the corn growing thereon; that in 1957 he harvested but 110 or 115 bushels from the land; that in July and August of 1958 similar flooding of the 8-1/3 acres occurred; that on this latter occasion the water washed out the crop, removed the top soil and exposed clay and rocks; and that in 1958 only about 100 bushels were harvested. This witness also testified that he did not farm the land in 1959 because of the rocky condition of the soil which made it impossible to operate a tractor on it.

Plaintiffs' witness, Orva Johnson, who was 67 years old testified that he never knew of the tract being a river bed; that he had examined the land just prior to testifying and that in his opinion it was worthless because of it being washed out in the middle.

Plaintiffs also introduced evidence that prior to the raising of the dam, the land was worth from \$300 to \$325 per acre and after being damaged by flooding it was worth from \$25 to \$50 per acre. Proof was also introduced as to the market value of corn in 1957 and 1958.

Eugene Dailey, a civil engineer and witness for defendant, testified that in his opinion the alteration of the dam had no effect upon the water level of the stream opposite plaintiffs' land.

at himself since 1953; that during all the years prior to 1953 no water came over the river bank although some flooding of the land by surface water from the upper ground had occurred; that during the time witness farmed the tract he raised 200 bushels of corn on it; that in July of 1957 the river rose, came over its bank and flooded through the 8-1/3 acres, destroying most of the corn growing thereon; that in 1957 he harvested but 110 or 115 bushels from the land; that in July and August of 1958 similar flooding of the 8-1/3 acres occurred; that on this latter occasion the water washed out the crop, removed the top soil and exposed clay and rocks; and that in 1959 only about 100 bushels were harvested. This witness also testified that he did not farm the land in 1959 because of the rocky condition of the soil which made it impossible to operate a tractor on it.

Plaintiff's witness, Vera Johnson, who was 7 years old testified that he never knew of the tract being a river bed; that he had examined the land just prior to testifying and that in his opinion it was worthless because of it being washed out in the middle.

Plaintiff also introduced evidence that prior to the raising of the dam, the land was worth from \$300 to \$350 per acre and after being damaged by flooding it was worth from \$25 to \$30 per acre. Proof was also introduced as to the market value of corn in 1957 and 1958.

Ernest Bailey, a civil engineer and witness for defendant, testified that in his opinion the alteration of the dam had no effect upon the water level of the stream opposite plaintiff's land.

The explanation given by this witness for the damage to plaintiffs' land in 1957 and 1958 was that the high water then came while the land was under cultivation and without protective cover; that if such a flooding occurred in the winter season it would go unnoticed. This witness further testified that the cause of the flooding of plaintiffs' land in 1958 was the record flood of that year which was the largest since 1950. Other witnesses for the defendant testified to having seen plaintiffs' land flooded in years prior to 1957.

In considering defendant's contention that the trial court should have entered judgment notwithstanding the verdict, we are concerned solely with the question whether there is in the record any evidence which standing alone and taken with all intendments most favorable to plaintiffs, tends to prove the material elements of their case. Lindroth v. Walgreen Co., 407 Ill. 121. When tested by this rule we think the evidence in the instant record furnished ample support for the verdict reached by the jury and that the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict.

Plaintiffs' witnesses testified that prior to the raising of the dam's height the 8-1/3 tract had been farmed; that after the dam was raised the river had gone over the bank at the southwest corner of the tract cutting a channel, destroying the crop, removing the top soil and thus rendering the land untillable. This evidence would appear to warrant no other conclusion than that the alteration of the dam caused the level of the water in the river to rise to a point where it overflowed and damaged plaintiffs' land as charged



The explanation given by this witness for the damage to Plaintiff's land in 1957 and 1958 was that the high water from some other source was under cultivation and without protective cover; that it was a flooding occurred in the winter season it would be unusual. This witness further testified that the cause of the flooding of Plaintiff's land in 1957 was the record flood of that year which was the largest since 1930. Other witnesses for the defendant testified to having seen Plaintiff's land flooded in years prior to 1957.

In considering defendant's contention that the trial court should have entered judgment notwithstanding the verdict, we are concerned solely with the question whether there is in the record any evidence which standing alone and taken with all reasonable inferences favorable to Plaintiff, tends to prove the material elements of their case. Johnson v. Johnson, 107 Ill. 121. When tested by this rule we think the evidence in the instant record furnished ample support for the verdict reached by the jury and that the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict.

Plaintiff's witness testified that prior to the raising of the dam's height the 2-1/2 street had been raised; that after the dam was raised the river bed rose over the bank at the defendant's corner of the street causing a channel, destroying the area, removing the top soil and thus rendering the land unsuitable. This evidence would appear to support no other conclusion than that the elevation of the dam caused the level of the water in the river to rise to a point where it overflowed and damaged Plaintiff's land as charged.

in the complaint. In our consideration of this evidence we are not concerned with its weight or the credibility of the witnesses who furnished the same. The right to determine the weight of the evidence is exclusively reserved to the jury.

The record indicates substantial disagreement between the witnesses for the parties as to the cause of the flooding and damage to plaintiffs' land, but we cannot say that a conclusion opposite to that reached by the jury is clearly apparent. To sustain defendant's contention under such circumstances would amount to passing upon the credibility of the witnesses and the weight of their testimony. Such determination is exclusively within the province of the jury.

Defendant complains of the giving of certain instructions for plaintiffs. One of these is plaintiffs' Instruction No. 1 which reads as follows:

"The court instructs the jury that the Constitution of Illinois provides that private property shall not be damaged for public use without just compensation. The court further instructs the jury that the use to which the defendant's dam, constructed and modified on the Little Vermilion River, is devoted, namely, the operation of the Georgetown Waterworks, is a public use; that inasmuch as the construction and modification of said dam on said river for said public use was authorized by the City of Georgetown, said City of Georgetown would be liable for any damage to the lands of the plaintiffs that was a direct and immediate result of the construction and modification of said dam. The court by this or any other instruction expresses no opinion on any question of fact in the case."

Defendant's objection to this instruction is that it refers to the constitutional provision prohibiting the taking of private property for public use without just compensation and was calculated

is the complaint. In our consideration of this witness we are not  
concerned with its weight or the credibility of the witness who  
furnished the same. The right to determine the weight of the evidence  
is exclusively reserved to the jury.

The record indicates substantial disagreement between the  
witnesses for the parties as to the cause of the flooding and damage  
to plaintiff's land, but we cannot say that a reasonable juror  
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ant's contention under such circumstances would amount to passing  
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mony. Such determination is exclusively within the province of the  
jury.

Defendant complains of the giving of certain instructions  
for plaintiff. One of these is plaintiff's instruction No. 1 which  
reads as follows:

"The court instructs the jury that the Constitution  
of Illinois provides that private property shall not  
be damaged for public use without just compensation.  
The court further instructs the jury that the use to  
which the defendant's dam, constructed and operated on  
the Little Wabash River, is devoted, namely, the  
operation of the Georgetown Waterworks, is a public  
use; that inasmuch as the construction and modification  
of said dam on said river for said public use was  
authorized by the City of Georgetown, said City of  
Georgetown would be liable for any damage to the lands  
of the plaintiff that was a direct and immediate result  
of the construction and modification of said dam. The  
court by this on any other instruction expresses no  
opinion on any question of fact in the case."

Defendant's objection to this instruction is that it refers  
to the constitutional provision regarding the taking of private  
property for public use without just compensation and was calculated



to mislead the jury into thinking that the only issue before them was the fixing of the amount of damages the same as in a condemnation case. This instruction was approved in Nixon v. City of Chicago, 212 Ill. App. 365, which was a suit to recover damages to the plaintiff's property alleged to have been caused by the construction of a tunnel in an alley under a permit issued by the defendant. The court there pointed out that such instruction is based on the provision of the Constitution protecting a plaintiff from being damaged for a public use without just compensation and that this principle applies to a public use which is required by a municipality. In the instant case defendant's dam was devoted to a public use and plaintiffs' claim was for damages arising from such use rather than from the physical disturbance of any of the rights which plaintiffs enjoyed in connection with the property in question. In other words, the basis of liability was the interference with plaintiffs' right to the full use of their property for the purpose to which it is best adapted. This is made clear by the instruction and it was not error to give the same.

Defendant also contends that a number of other instructions were erroneous and prejudicial to its case. These criticisms appear to be the same as that leveled against plaintiffs' Instruction No. 1 and are disposed of by what we have said concerning the latter.

Defendant's remaining contention is that the court erred in overruling its objections to certain questions asked of the witnesses Daily and Dowers on cross-examination. The record indicates that the questions objected to were within the scope of

to allow the jury into finding that the only issue before them was the fixing of the amount of damages the same as in a common-law case. This instruction was approved in Nixon v. City of Chicago, 112 Ill. App. 382, which was a suit to recover damages to the plaintiff's property alleged to have been caused by the construction of a tunnel in an alley under a permit issued by the defendant. The court there pointed out that such instruction is based on the provision of the Constitution protecting a plaintiff from being damaged for a public use without just compensation and that this principle applies to a public use which is required by a municipality. In the instant case defendant's dam was devoted to a public use and plaintiff's claim was for damages arising from such use rather than from the physical disturbance of any of the rights which plaintiff enjoyed in connection with the property in question. In other words, the basis of liability was the interference with plaintiff's right to the full use of their property for the purpose to which it is best adapted. This is made clear by the instruction and it was not error to give the same.

Defendant also contends that a number of other instructions were erroneous and prejudicial to its case. These criticisms appear to be the same as that leveled against plaintiff's instruction 10, and are disposed of by what we have said concerning the latter. Defendant's remaining contention is that the court erred in overruling its objection to certain questions asked of the witnesses fairly and honestly on cross-examination. The record indicates that the questions objected to were within the scope of

the direct examination. The trial court did not err in allowing the witnesses to answer.

The judgment of the Circuit Court is affirmed.

Affirmed.

REYNOLDS and ROETH, JJ., concur.



the direct examination. The trial court will not say in advance and  
advised to answer.

The judgment of the Circuit Court is affirmed.

Affirmed.

REYNOLDS and FOWLER, JJ., concur.

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STANLEY OLIPRA,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM
	)	
v.	)	SUPERIOR COURT
	)	
JOSEPH ZAMBELLI, et al.,	)	COOK COUNTY
	)	
Defendants.	)	
	)	
On Appeal of CITY OF CHICAGO,	)	
a Municipal Corporation,	)	
	)	
Defendant-Appellant.)	)	

28 I.A.<sup>2d</sup> 460

MR. PRESIDING JUSTICE BURKE DELIVERED  
THE OPINION OF THE COURT

Stanley Olipra sued to recover damages for personal injuries suffered on August 10, 1952, as the result of a misfiring of an aerial bomb in a Chicago street. Many such bombs had been exploded that day in a vacant lot and in the street as a part of an annual street parade sponsored by the Congregation of San Rocco Modugno, a not for profit corporation. The misfiring of the bomb caused fragments of a metal cannister in which the bomb had been placed to strike plaintiff's leg. He was standing among the spectators on the sidewalk. The parade had been licensed by the City, which had also licensed Joseph Zambelli to conduct a fireworks display in a vacant lot on three days, including the day of the occurrence. Zambelli had been hired by the society for this purpose as in previous years. Uniformed city police officers accompanied the parade in 1952 as they had in the years before. A verdict of guilty assessing damages at \$12,000 was returned against Zambelli, the not for profit corporation and the City of Chicago. The post



trial motion of the City was denied and the court entered judgment on the verdict. The City appealed.

This case arose from the same fireworks incident discussed in the recent case of Adamczyk v. Zambelli, 25 Ill. App. 2d, 121. (Petition for leave to appeal denied September 28, 1960.) Plaintiff asserts that the two cases are wholly dissimilar in the evidence presented at the trials. On appeal by the plaintiff in the Adamczyk case we said that the question is whether there is any competent evidence of probative value, with all inferences viewed most favorably to the plaintiff, tending to prove the material elements of his case, and decided that the trial judge was right in directing a verdict for the City.

We have read the abstract and briefs in the Adamczyk case and the well-reasoned opinion, and conclude that the facts and the law applicable thereto are substantially the same as in the case at bar. We have therefore decided to adopt the opinion of the Adamczyk case as our opinion in the instant case.

The judgment against the City of Chicago is reversed and the cause is remanded with directions to enter judgment for that defendant and against plaintiff.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS

FRIEND, J., and  
BRYANT, J., Concur



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HERMAN KENNEDY and IRENE  
KENNEDY, his wife, and  
JAMES HUGHES and VIOLA HUGHES,  
his wife,  
Plaintiffs-Appellants  
vs.  
IVAR W. TURNQUIST, INC., a  
Corporation,  
Defendant-Appellee.

APPEAL FROM THE  
MUNICIPAL COURT  
OF CHICAGO

28 I.A.<sup>2d</sup> 482

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an action for the return of \$1000 earnest money, deposited by the plaintiffs, co-purchasers of an apartment building at 7554 Langley Avenue, Chicago, Illinois, with the defendant, a corporation doing business as a real estate broker. The cause was tried before the Court without a jury and at the conclusion of the evidence, the Court entered judgment for the defendant.

The plaintiffs base their claim on the sole ground that their offer to purchase was never accepted by the sellers. This was the only contested issue at the trial.

It was stipulated that the plaintiffs submitted an offer to purchase the property for \$21,000 on May 8, 1954 and deposited \$1000 as earnest money with the defendant broker. The agreement provided that in the event of a default, the \$1000 earnest money would be forfeited as liquidated damages.

The defendant's president, Ivar W. Turnquist, was the sole witness at the trial. He testified that he mailed the signed offer to purchase to the sellers in Ft. Pierce,





Florida on May 8, 1954 and that the offer was accepted by the sellers three days later. The witness identified the signatures of the sellers and said that their signatures appeared on the document upon its receipt from Florida. The witness testified that he notified the plaintiffs that the contract was signed and that they should make their application for a mortgage, and that when he later contacted them on their failure to make the application, he was informed that there was some disagreement between the co-purchasers as to who was to take which apartment. The defendant declared the earnest money forfeiture in June 1954 after the plaintiffs made a demand for the return of their deposit. The property was sold in August 1954 to another party.

The plaintiffs now contend that there was not sufficient evidence to show that the offer to purchase had been accepted by the sellers. This position is untenable as the uncontradicted testimony of the defendant's witness clearly established that the document was signed and accepted three days after the offer was submitted. The plaintiffs did not controvert this testimony and as there is nothing inherently improbable or contradictory in the defendant's version, the court is bound to believe it. As the court held in *Kelly v. Jones*, 290 Ill. 375, 378,

"Where the testimony of a witness is uncontradicted either by positive testimony or circumstances, and is not inherently improbable, it cannot be rejected."

The plaintiffs also advance a different theory for the recovery of the earnest money. They now suggest that the



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provision relating to the forfeiture refers to the seller and not the broker. Under this interpretation, they contend, the broker did not have the right to declare the forfeiture and its action amounted to a conversion.

This new theory cannot be offered at this late date. It has been repeatedly held that a party cannot try a case on one theory in the trial court and on another theory in a court of review. *Chicago Title and Trust Co. v. De Lassaux, et al.*, 336 Ill. 522, 529.

Judgment for the defendant is affirmed.

BURKE, P.J., and  
FRIEND, J. Concur



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[illegible]

V.

ROY T. OMUNDSON, JOHN H. BELL,  
MARMON-HERRINGTON COMPANY, INC.,  
an Indiana corporation, and  
CARDON CORPORATION, an Illinois  
corporation,

28 I.A.<sup>2d</sup> 499

Appellees.

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This is a shareholder's derivative suit, seeking relief from an alleged gift of corporate assets to corporate officers and directors. After sustaining motions to strike an amended complaint and a second amended complaint, the chancellor dismissed the action, and plaintiff appeals. The question presented is whether the second amended complaint states a cause of action.

Plaintiff, Leo J. Doyle, Jr., is the holder of 300 shares of the common stock of defendant Marmon-Herrington Company, Inc., an Indiana corporation. Defendant Cardox Corporation, an Illinois corporation, is a wholly owned subsidiary of Marmon. On December 1, 1958, Cardox sold certain of its assets to Chemetron Corporation, a Delaware corporation, for \$2,000,000 in cash and 165,000 shares of the common stock of Chemetron, pursuant to an agreement entered into by Cardox and Chemetron dated November 14, 1958. On that date, defendants Roy T. Omundson and John H. Bell were members of





the boards of directors of both Marmon and Cardox. Marmon had 603,675 shares of common stock outstanding, of which Omundson owned 16,500 shares and Bell owned 20,000 shares.

Following the sale, Omundson and Bell, and nineteen officers and key employees of Cardox, entered the employ of Chemetron, and all twenty-one exercised a stock exchange option given them in the Cardox-Chemetron agreement of November 14, 1958. They exchanged with Cardox a total of 98,242 shares of Marmon common stock for 49,121 shares of Chemetron held by Cardox, on the basis of two shares of Marmon for one share of Chemetron.

The second amended complaint substantially alleges the foregoing. It also alleges that Omundson and Bell were in a fiduciary relation to Cardox, to Marmon and to the shareholders of Marmon; that on November 14, 1958, the market price of Marmon common stock was approximately 15 and that of Chemetron 33-3/4, and on December 1, 1958, Marmon was 13-1/4 and Chemetron 35; that the twenty-one officers and key employees of Cardox were unjustly enriched to the extent of more than \$400,000; and that Omundson and Bell fraudulently and unjustly enriched themselves \$155,125.

Plaintiff further alleges that although he made a demand on the officers and directors of Marmon on December 11, 1958, they took no action to remedy the wrongs complained of, and as the more than 1,000 shareholders of Marmon are "scattered throughout the



United States," he "has no practical method of communicating with all of said shareholders and obtaining their assent and cooperation on remedying the wrongs complained of herein." The trial court record also shows a stipulated copy of the Cardox-Chemetron November 14th agreement. We have examined it and find nothing to indicate its status or purpose in the record.

We agree with plaintiff that when the fairness of a sale or transfer of corporate assets to directors is properly questioned, the burden of proof is on the defendant directors to establish the fairness and reasonableness of the transaction and to show "that the corporation was paid full consideration and suffered no detriment, nor was deprived of any proper benefits." (Shlensky v. So. Parkway Bldg. Corp., 19 Ill. 2d 268, 290 (1960).) We also agree that Omundson and Bell, as directors of Marmon and Cardox, owed a fiduciary duty to those corporations and their shareholders to insure that the corporations received full value in any transaction in which they participated. Dixmoor Golf Club v. Evans, 325 Ill. 612, 616 (1927).

However, plaintiff is required to allege in his complaint sufficient facts to properly challenge the questioned transaction before any presumption, which the directors have the burden of overcoming, arises against the validity of the transaction. The court will examine the complaint in its entirety and determine whether,



under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers, and injury to himself, as will justify the suit. "It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs. \* \* \* 'The circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought.'" (Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455, 463 (1903).) A cause of action includes every fact necessary for the plaintiff to prove to entitle him to succeed, and every fact which the defendant would have a right to traverse. McBreen v. Iceco, Inc., 12 Ill. App. 2d 372, 380 (1957).

Shareholders must be protected from exploitation but, at the same time, undue restrictions of corporate activity should be avoided. A director may deal with a corporation of which he is a member, or with another corporation he may own or control, but "if only one of the directors voting for the transaction profited thereby, and his vote was necessary, the transaction would be tainted with the same illegality and fraud as though they were all interested." Under such circumstances, the directors have the burden of overcoming the presumption against the validity of the transaction by showing its fairness and propriety. Shlensky v. So. Parkway Bldg. Corp., 19 Ill. 2d 268, 278, 280.





Plaintiff does not ask that the entire Cardox-Chemetron transaction be set aside and, except for the key employee stock option plan, he is apparently satisfied that the directors acted for the best interests of the corporation. We agree there should be a reasonable relationship between the values of exchanged stocks, subject to normal fluctuation. An allegation of profit because of disproportionate values of exchanged shares, without having been related to the entire transaction, is not sufficient to make a prima facie case of constructive fraud or self-dealing and dishonest exercise of corporate authority. The directors represent all the stockholders and are presumed to act honestly and according to their best judgment, for the interests of all.

Beyond the allegation that Omundson and Bell, as directors, occupied a fiduciary relationship, plaintiff alleges no facts to show that the defendant directors, fraudulently or otherwise, set the terms of the exchange; or that they voted as directors of either Marmon or Cardox for such terms, and that their votes were necessary for the authorization of the plan; or that they failed to disclose relevant facts known to them to other members of the respective boards; or that they controlled or dominated the respective boards or engaged in any of the activities which resulted in the agreement of November 14. There is no allegation that the transaction was not authorized by a disinterested majority of its board of directors, or as to how many directors on either board



voted for or against the transaction, or that Omundson and Bell voted as directors on either board at any time the plan was being considered. No facts are alleged showing any secret dealing, actual conflict of interest, collusion, bad faith, or that the agreement of which the stock option plan was a part was, in its entirety, unfair to Cardox.

We concur in the remarks made at the time of the entry of the decree of dismissal by the chancellor, the late Judge Niemeyer, when he said: "I don't think it takes an expert in financial matters or business matters to infer that the purchase price to be paid depended at least in part upon the continuation of the operations of the division bought under the direction of the men who had long been connected with the seller. \* \* \* if we strip it of everything, this fifty thousand shares of the purchaser which were to be exchanged for the hundred thousand shares of the seller, were put in there as an inducement to get these key men and key officers, and, in addition to that, to promote their loyalty and morale."

We believe our conclusions in this case do not require a discussion by us of the sufficiency of the allegations of plaintiff's demand on the directors of Marmon, or the insufficiency of the allegations excusing the failure to make a demand for relief



upon the stockholders of Marmon in meeting assembled. Swanson v. Traer, 249 F.2d 854 (1957); Goldberg v. Ball, 305 Ill. App. 273 (1940).

For the reasons given, the decree appealed from is affirmed.

AFFIRMED.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.





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WALTER SLOMIN,

Appellee,

v.

JOSEPHINE SLOMIN,

Appellant.

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APPEAL FROM SUPERIOR COURT,

COOK COUNTY

28 I.A. 511

MR. JUSTICE FRIEND delivered the opinion of the court:

Plaintiff filed a complaint for divorce, alleging that on August 22, 1925 the parties were married, subsequently divorced on August 14, 1947, remarried on May 25, 1948, and that on January 29, 1958 defendant willfully absented herself and deserted him. Defendant's answer denied the allegations of the complaint with respect to the charge of desertion, and asked that the suit be dismissed. The cause was tried as a contested matter. Plaintiff, who testified to the desertion, and defendant, who denied it, were the only witnesses. Pursuant to the hearing, a decree of divorce was entered in favor of plaintiff dissolving the bonds of matrimony and providing that defendant be forever barred from asserting any claims against plaintiff for past, present or future alimony, property rights of any kind and nature, and attorneys' fees, temporary, permanent or otherwise, from which defendant appeals.

About two weeks after the entry of the decree, defendant presented a petition wherein she alleged that prior to the hearing she informed her attorney that her adult son would be a witness to corroborate her testimony that plaintiff left



without cause, and that she would also have other witnesses who would so testify; that her attorney informed her no witnesses were necessary; and that without witnesses other than herself she was denied a full hearing. She also stated in her petition that the decree was entered on uncorroborated evidence of plaintiff; that the court should have required corroborating evidence; and that during trial she learned that her attorney was paid \$100.00 by plaintiff's attorney.

Plaintiff filed a motion to dismiss the petition, averring that the acts of defendant's counsel became her acts, that the allegations do not come within the purview of newly discovered evidence, and that no showing was made as to what the witnesses would testify to; that she was given a full hearing and cannot complain of her counsel's trial strategy; that fees paid to her counsel by plaintiff were temporary fees to which he was entitled; and that corroboration in a contested matter is not necessary.

Defendant's attorney filed an answer to his client's petition, stating that it was a gross reflection on his integrity, and setting forth that upon his questioning her as to why she did not have her son testify, "she replied 'that he was sick, that he was tired of the whole matter, and that he would have nothing to do with it.' " Counsel averred that defendant said she had no other witnesses. With reference to the payment of his fees, he stated that he told attorney for plaintiff that he was entitled to attorney's fees, that the attorney agreed and accordingly paid him \$100.00 for representing defendant.



All that appear of record are the pleadings and the decree. No report of proceedings is included; therefore the presumption arises that there was sufficient evidence to sustain the decree of the trial court. *Leathers v. Leathers*, 13 Ill. 2d 348, 354 (1958); *In re Estate of Murray v. Appeal of Murray*, 310 Ill. App. 121, 126 (1941); *Ramming v. Roland*, 198 Ill. App. 91 (Abst. 1916). With respect to the denial of the petition to vacate the decree, it appears that no appeal was taken from that order, but only from the entry of the decree, and therefore we do not have before us for review the order of dismissal.

One of the grounds urged for reversal is that the decree was entered on plaintiff's uncorroborated evidence. In support of her contention that the uncorroborated evidence of plaintiff, when denied by defendant, is not sufficient to sustain a decree for divorce, plaintiff cites *Whitlock v. Whitlock*, 268 Ill. 218 (1915), where the reviewing court refused to uphold a decree granting a divorce for adultery by the wife where the only specific evidence that tended to prove the charge was the testimony of a biased witness whose story was improbable and in part clearly impossible, and which was contradicted by credible witnesses. In a contested divorce case it is the preponderance of the evidence, rather than its corroborative nature, that is controlling. "The nature and extent of proof necessary in a case of this kind [a contested divorce action] is discussed at considerable length in the briefs of the parties," said the court on pages 3-4 of the full opinion in *Olbinski v. Olbinski*, 336 Ill. App. 225 (Abst. 1948). "Section 8 of the Divorce Act





(par. 9, chap. 40, Ill. Rev. Stat. 1947)," it continued, "provides in part that the cause of divorce must be fully proven by reliable witnesses. However, a different rule applies when the alleged ground for divorce is contested. In *Teal v. Teal*, 324 Ill. 207, it was held (p. 214) that the degree of proof required in contested divorce cases 'is the same as in all other cases of a civil nature - by the preponderance of the evidence.' " In *Molner v. Molner*, 186 Ill. App. 233 (Abst. 1914), the court stated that section 8 of the Divorce Statute requiring that the cause of divorce be fully proven by reliable witnesses does not apply when a trial is had and issues joined by bill, answer, and replication. In such case, the court held, the ordinary chancery rules apply, and the weight of the evidence is the principal consideration; the preponderance of evidence may be resolved in favor of a party having but one witness.

The allegation of defendant's petition that plaintiff's counsel gave defendant's attorney \$100.00 in fees is evidently made to suggest misconduct. The usual procedure for the payment of attorneys' fees to the wife's counsel is by petition or motion. Here, however, defendant's attorney stated in his answer that he and plaintiff's counsel had, between them, reached an agreement as to the fee to which defendant's attorney was entitled.

Defendant feels aggrieved because the decree forever bars her from asserting any claim for alimony, attorneys' fees, and property rights, and her counsel rely on *Shankland v. Shankland*, 301 Ill. 524, 531 (1922), which cites the early cases



of Spitler v. Spitler, 108 Ill. 120 (1883), Reavis v. Reavis, 1 Scam. 242 (1835), and Deenis v. Deenis, 79 Ill. 74 (1875), all holding in effect that under the Illinois statute on divorce a wife may recover permanent alimony from her husband in a suit for divorce brought by him where the divorce is granted solely upon the charge of desertion. In the instant proceeding plaintiff filed no crosscomplaint, nor did she seek or make any application for alimony or solicitors' fees. She interposed no affirmative defense, no request for any equitable relief whatsoever. Her answer is merely a denial of the charge of desertion. In the absence of any report of proceedings we have no way of knowing what prompted the court to deny alimony, attorneys' fees, etc.

Under the circumstances, we are constrained to affirm the decree, and it is so ordered.

Decree affirmed.

BURKE, P.J. <sup>jr</sup> and  
BRYANT, J. <sup>jr</sup> Concur













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